BJ's Wholesale Club, a subsidiary of Waban, Inc. *and* United Food and Commercial Workers Union, Local 400, AFL–CIO. Cases 5–CA–22706 and 5–RC–13708

October 31, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS COHEN AND TRUESDALE

On January 6, 1994, Administrative Law Judge Bernard Ries issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed cross-exceptions and a supporting brief, the Charging Party filed limited cross-exceptions and brief in support, and both the General Counsel and the Charging Party filed briefs in answer to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent violated Section 8(a)(3) and (1) by discharging employees Michael Riley and Anthony Kelley and violated Section 8(a)(1) by words and conduct that broadened its no-solicitation rule in a manner that discouraged protected activity. He dismissed all other allegations of 8(a)(1) conduct. In addition, the judge overruled the Respondent's Objections 1, 4, and 5 to the conduct of the election,[2] which were consolidated for hearing with the unfair labor practice proceeding.

We disagree with the judge's findings with respect to his dismissal of the allegation that the Respondent's questioning of Jane Delimba concerning her union sympathies did not violate Section 8(a)(1). We further disagree with the judge with respect to his overruling the Respondent Employer's Objection 1 to the election, and conclude that the election must be set aside on the basis of record evidence substantiating allegations contained thereunder.

The Interrogation of Jane Delimba

Crediting the testimony of employee Jane Delimba, the judge found that a few weeks after the first union meeting, the Respondent's personnel manager, Leroy Singleton, approached Delimba while she was working in the health and beauty aids department. Singleton asked Delimba how she felt about the Union. Delimba replied that she was very much in favor of it. Singleton countered that if she felt as if things in the store were bad, they would get even worse once a union got in because employees would lose the ''open door'' policy with management and that employee communications would have to be directed through a union steward.

Noting that the conversation took place at Delimba's own work station, that she replied honestly to the question concerning her union sentiments, the friendly relationship between Delimba and Singleton, and comparing these facts with those found nonviolative in *Sunnyvale Medical Clinic*,[3] the judge concluded that no finding of violation is warranted.

We disagree both with the judge's interpretation of *Sunnyvale* and with his conclusion. We find, instead, that Singleton's conduct constitutes an unlawful coercive interrogation.

First of all, the judge, who described the circumstances in *Sunnyvale* as ''even stronger for finding a violation than those here,'' mistakenly states that the supervisor in *Sunnyvale* ''ushered'' the employee into the supervisor's office and began asking questions about the union. In fact, the employee went on her own initiative to the personnel director's office in order to deliver a dues-deduction authorization card. By so doing, she voluntarily entered into a management setting and openly revealed her support for the union. When the personnel director asked if her prounion position was a personal reaction to her, the employee assured her that it was not. The personnel director then noted that employees would not necessarily get what they wanted just by joining the union and that the employer ''wanted the Union out of the

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent specifically contends that the judge failed to resolve credibility conflicts between employee Kelley, on the one hand, and Meat Department Manager Blalock and Assistant Store Manager Levin, on the other. There is no merit to the Respondent's assertions. The judge clearly states that he credits Kelley's testimony over that of both Blalock and Levin, but that, in his analysis, the specific content of particular conversations is not critical to his determination of the merits of the unfair labor practice. Thus, there are no unresolved matters of credibility.

No exceptions were filed to the judge's dismissal of allegations that the Respondent violated Sec. 8(a)(1) by creating the impression that its employees' union activities were under surveillance and by instructing employees to request that the Union return their signed authorization cards.

[2] The initial tally of ballots revealed that, of 152 eligible voters, 68 voted for representation by the Union and 67 against, with 12 challenges. The parties thereafter resolved nine of the challenges as cast by ineligible voters. The Respondent filed five objections. The Regional Director overruled two of the objections and consolidated the remaining three for hearing in the instant unfair labor practice proceeding.

[3] 277 NLRB 1217 (1985).

clinic.'' Because the parties to the conversation had a friendly relationship, there was no history of employer hostility toward union supporters, there was no threat of adverse action, and because the nature of the questions was general and nonthreatening, the Board in that case affirmed the judge's conclusion that the encounter was not coercive.

By contrast, Delimba's sentiments toward the Union were not apparent to Singleton. It was early in the campaign and Delimba wore no union insignia. Singleton approached Delimba in the middle of a workday and, without provocation, initiated the conversation by directly inquiring about her feelings toward the Union. The fact that Delimba replied honestly that she favored the Union perhaps could reflect nothing more than Delimba's surprise at the question and the guilelessness of her character where there had been no other indication of her status as an open union partisan. We believe this exchange differs from that in *Sunnyvale*, where a supervisor inquired as to whether the employees' desire for union representation was motivated from a personal animosity toward the supervisor. Finally, while Delimba and Singleton may, indeed, have had a friendly working relationship, this dialogue did not arise out of a friendly or casual conversation between them. It was, instead, begun by the supervisor with a direct question concerning the employee's union stance and elicited information concerning employee union sentiment and communicated an antiunion campaign message concerning the need for employees to voice their views through a steward rather than management's open door if the Union were elected. In the totality of these circumstances, we find that this conversation may reasonably be viewed as coercive.[4] Accordingly, we find that by Singleton's questions and comments to Delimba during late January, the Respondent has violated Section 8(a)(1) of the Act.[5]

The Election Objection

The Respondent Employer's Objection 1 reads as follows:

> The Employer objects to the Petitioner's conduct, during the critical period prior to the election, of Petitioner's agents, representatives, attorneys and adherents, allegedly threatening to use Petitioner's influence, power and long term collective bargaining relationship with another employer to have one or more of the Employer's employees discharged from a position of employment held by the employee with that other employer, who has an ongoing collective bargaining relationship with the Petitioner, unless the employee voted in favor of representation by the Petitioner in the upcoming election or resigned his employment with the Employer.

In his report on objections and challenges, the Regional Director stated that Objection 1 ''is substantially the same as the allegations'' in pending Case 5–CB–7217. He then consolidated for hearing with the unfair labor practice proceeding three employer objections.

The unfair labor practices alleged in Case 5–CB–7217 were that the Petitioner violated Section 8(b)(1)(A) and (2) by informing another employer, Giant Food, that its employee, Aaron Fletcher, was also employed by the Employer, in violation of Giant Food's policy prohibiting its employees from working for competitor stores, and that the Petitioner took this step in order to force Fletcher to choose between his employers because the Petitioner believed Fletcher was going to vote against representation. The complaint further alleged that on the day of the election, the Petitioner's agent Michael Riley violated Section 8(b)(1)(A) by telling employees that the Petitioner would not have informed Giant Food of Fletcher's employment with the Employer had Fletcher not expressed his intention to vote against the Petitioner.

The judge disputed the Regional Director's description of Objection 1 as being ''substantially the same'' as the unfair labor practice allegations, finding that the objection was limited to threats, while the alleged violations of the Act included actual efforts to interfere with an employee's employment. During the course of this proceeding, however, Case 5–CB–7217 was settled by informal agreement among the parties. The Respondent Employer sought clarification from the Regional Director as to the scope of the matters remaining at issue under the rubric of Objection 1. The Regional Director's response was that his report was ''clear on its face'' and that what remained for the judge to decide in Case 5–RC–13708 were the election objections identified specifically as Objections 1, 4, and 5. The judge accordingly determined that only those matters alleged as threats, and not evidence relating to Fletcher's actual loss of employment, were appropriately considered within the ambit of the objection.

Credited evidence establishes that on the day of the election, employee organizing committee member Kenneth McLaughlin was handbilling outside the Employer's entrance when Fletcher called him aside. They went to the breakroom where Fletcher told him that the Union had caused him to lose his job with Giant Food.

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[4] *Pacesetter Corp.*, 307 NLRB 514, 518 (1992).

Chairman Gould finds it unnecessary to rely on *Sunnyvale Medical Clinic*, supra.

[5] In view of our finding this to be an unlawful interrogation, we find it unnecessary to address the allegation of subsequent interrogation (pre-Easter) involving Delimba and Singleton or the allegation of interrogation by Assistant Merchandise Manager Levin of employee Carpenter, because such incidents are merely cumulative and do not affect the Order.

McLaughlin went outside to where Riley[6] was handbilling and asked him about it. Riley told McLaughlin that he ''thought'' that if the Union had not known that Fletcher was a ''no vote,'' nothing would have been said about it. McLaughlin testified that he did not think any other employees had heard either conversation and that Fletcher's situation was not commonly known; however, just after talking with Riley, McLaughlin spoke with employee Kendall Miller about the issue. The entire sequence of events took place immediately prior to the opening of the polls.

Analyzing this incident on the basis of the third-party conduct standard,[7] the judge found that the foregoing contained no evidence of a threat. He found that Riley's expression to McLaughlin of what he ''thought'' could not have interfered with the vote of a fellow organizing committee member. Because these events took place so close to the election, the judge found little potential for dissemination, and concluded that anyone who might have heard about it would likely have been affected adversely to the Union rather than persuaded to vote for it. Accordingly, the judge recommended overruling the objection.

We find that the judge construed the Regional Director's clarification of the matters remaining for hearing in an unduly restrictive manner and that the scope of the issue presented by Objection 1 requires consideration of all the evidence that emerged as a result of the inquiry into the circumstances of the objection.[8] Although it is not necessary, and would have been improper, to litigate the merits of the settled unfair labor practice charge itself, it is appropriate that the circumstances giving rise to the objection be fully explored in order properly to assess the atmosphere in which the election was conducted. In this way, comments, conversations, and events can be placed in context and the impact on employees of those words and actions can be better understood. Accordingly, we find that the breadth of the inquiry into the circumstances of the objection was not limited by the settlement of the complaint allegations and that the judge was free to consider the impact on the election of evidence concerning the Union's alleged unlawful actions as well as any threats relating to such actions.[9]

Testimony from Linda Duvall, an assistant director of labor relations for Giant Food, establishes that the Petitioner's service director, Erdman, contacted her with the information concerning Fletcher's dual employment and that this led eventually to Fletcher's involuntary departure from Giant's employ. With this as background, McLaughlin's encounter with Fletcher on the day of the election, coupled with Riley's reinforcing comments concerning what the Union's motivation may have been in contacting Giant, takes on greater force. McLaughlin's testimony reveals that the subject of Fletcher's nonsupport for the Union had been discussed openly at organizational meetings and was, thus, known to the Petitioner. In these circumstances, Riley's answer to McLaughlin's question about Fletcher on the day of the election appears to confirm the notion of union retaliation against a nonsupportive employee.

Further, contrary to the judge's description, this news was not rendered harmless for lack of dissemination. Rather, the evidence shows that at least four voters became aware of the issue immediately prior to casting their ballots. Not only were McLaughlin, Fletcher, and Riley discussing the matter, but McLaughlin testified that he also spoke with employee Miller about it as well. In an election in which the outcome may turn on a single vote,[10] the impact of such information on even a few individuals could be decisive. Moreover, we find that the emergence of this issue just moments before the opening of the polls intensified its impact on those employees to whom it became known. There was no opportunity for the impact of the news to dissipate or to be explained away.

Accordingly, we find that the evidence substantiates the allegations of Objection 1 and that the Petitioner's actions in this regard interfered with the conduct of a free and fair election.[11] The election is, therefore, set aside and the representation portion of this proceeding will be remanded to the Regional Director for the purpose of conducting a second election.

CONCLUSIONS OF LAW

1. The Respondent, BJ's Wholesale Club, a subsidiary of Waban, Inc., is an employer engaged in com-

[6] Riley, the leading union adherent, was found to have been discriminatorily discharged by the Respondent Employer prior to the election. Despite his termination, Riley continued to serve as co-chair of the organizing committee.

[7] The judge found that Riley, as a member of an employee organizing committee who assisted in soliciting signatures on authorization cards, handbilled, and spoke to employees about unionization, was not an agent of the Union and that his comments are not attributable to it. He noted that the Union had several business representatives involved in this campaign and that Riley referred employees to them to respond to questions.

[8] *Chef's Pantry, Inc*., 247 NLRB 77, 82 fn. 30 (1980). See also *White Plains Lincoln Mercury*, 288 NLRB 1133, 1138–1139 (1988); *Best Western Executive Inn*, 272 NLRB 1315 fn. 1 (1984); and *Fiber Industries*, 267 NLRB 840 fn. 2 (1983).

[9] While the judge discusses at length the fact that the Regional Director has restricted the scope of the inquiry, as a practical matter, he does consider the impact of the Union's alleged unlawful conduct and finds it not to have interfered with the election. We disagree with his conclusion in this regard.

[10] The initial tally of ballots reveals that, of 152 eligible voters, 68 voted in favor of the Union and 67 against, with 12 determinative challenges.

[11] In light of this finding, Chairman Gould finds it unnecessary to pass on the Respondent's Objections 4 and 5.

merce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Food and Commercial Workers Union, Local 400, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. At some time between January and May and in April 1992, the Respondent violated Section 8(a)(1) of the Act through its agents communicating to employees that they could not engage in solicitation and/or distribution of literature at such times and in such places as, with respect to union solicitation and distribution, they are legally entitled to do.

4. In late January 1992, the Respondent violated Section 8(a)(1) of the Act by its agent's unlawful interrogation of employees concerning their union membership, activities, and sympathies.

5. On April 10 and May 1, 1992, the Respondent violated Section 8(a)(3) of the Act by discharging, respectively, Michael Riley and Anthony Kelley.

6. The aforesaid violations affect commerce within the meaning of Section 2(6) and (7) of the Act.

7. Other than in the foregoing respects, the Respondent has not violated the Act in any other manner.

8. The allegations raised in Employer's Objection 1 to the election held in Case 5–RC–13708 are sufficient to warrant a finding that the Union interfered with the conduct of the election and that a second election should be held.

THE REMEDY

Having found that the Respondent has violated Section 8(a)(3) and (1) of the Act, we shall order the Respondent to cease and desist from engaging in such conduct and to take certain affirmative action. The Respondent is ordered to offer Michael Riley and Anthony Kelley immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority and other rights and privileges, and to make them whole for any net loss of earnings they may have suffered from the dates of their discharges to the dates of the Respondent's offers of reinstatement, with interest, in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent shall remove from its files any references to the discharges of these individuals, and notify them, in writing, that this has been done. No evidence of these unlawful discharges shall be used as a basis for future personnel actions against them.

We also shall modify the judge's cease-and-desist order to provide for a narrow order as the Respondent's unfair labor practices do not warrant imposition of a broad order. *Hickmott Foods*, 242 NLRB 1357 (1979).

ORDER

The National Labor Relations Board orders that the Respondent, BJ's Wholesale Club, a subsidiary of Waban, Inc., Woodbridge, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees because of any activities in which they may engage on behalf of United Food and Commercial Workers Union, Local 400, AFL–CIO or any other labor organization.

(b) Communicating to employees that they are prohibited from engaging in solicitation and/or distribution of literature at such times and in such places as, with respect to union solicitation and distribution, they are legally entitled to do.

(c) Interrogating employees concerning their union membership, activities, or sympathies.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist the Union or any labor organization; to bargain collectively through representatives of their own choosing; to engage in concerted activities for the purposes of collective bargaining or other mutual aid; or to refrain from any and all such activities.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) If it has not done so, offer to Michael Riley and Anthony Kelley immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole in the manner set forth in the remedy.

(b) Remove from its files any references to the discharges of Michael Riley and Anthony Kelley and notify them in writing that this has been done and that their discharges will not be used against them in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its place of business in Woodbridge, Virginia, copies of the attached notice marked ''Appendix.''[12] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

posted by the Respondent for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the election held on May 22, 1992, in Case 5–RC–13708 is set aside and that this case is severed and remanded to the Regional Director for Region 5 for the purpose of conducting a new election.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any employees to discourage membership in United Food and Commercial Workers Union, Local 400, AFL–CIO or any other labor organization.

WE WILL NOT communicate to employees that they are prohibited from engaging in solicitation and/or distribution of literature at such times and places as, with respect to union solicitation and distribution, they are legally entitled to do.

WE WILL NOT interrogate employees as to their union membership, activities, or sympathies.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights to self-organization, to form, join, or assist the Union or any labor organization; to bargain collectively through representatives of their own choosing; to engage in concerted activities for the purposes of collective bargaining or other mutual aid; or to refrain from any and all such activities.

WE WILL offer, if we have not done so, Michael Riley and Anthony Kelley their former jobs and WE WILL compensate them with interest for any loss of pay they may have suffered as a result of their discharges; and WE WILL remove from our files any reference to their discharges and notify them that this has been done and that their discharges will not be used against them in any way.

BJ'S WHOLESALE CLUB, A SUBSIDIARY OF WABAN, INC.

Paula S. Sawyer, Esq. and *Ronald Broun, Esq.*, for the General Counsel.

Harold R. Weinrich, Esq. and *Thomas Piekara, Esq. (Jackson, Lewis, Schnitzler & Krupman)*, of Washington, D.C., for the Respondent.

Carey Butsavage, Esq. and *Dianna Louis, Esq. (Butsavage & Associates)*, of Washington, D.C., for United Food and Commercial Workers Union, Local 400, AFL–CIO.

DECISION

STATEMENT OF THE CASE

BERNARD RIES, Administrative Law Judge. These consolidated matters[1] were tried in Arlington, Virginia, on 13 days between May 11 and July 15, 1993.[2] The amended complaint in Case 5–CA–22706 alleges that Respondent BJ's violated Section 8(a)(1) of the Act by various conduct and violated Section 8(a)(3) by discharging, on April 10, 1992,[3] and April 26, two employees, and by issuing a disciplinary notice to one of them. The matters referred to me arising out of an election held among BJ's employees on May 22 consist of the eligibility of three challenged voters[4] and the validity of three objections to the election filed by Respondent BJ's.

Briefs were filed by all parties on or about September 21, 1993. Having reviewed the entire record, the briefs, and my recollection of the demeanor of the witnesses, I make the following

[1] The previously captioned formal documents in these consolidated cases included Case 5–CB–7217, in which Local 400 was named as the Respondent. During the hearing, as further discussed infra, that case was settled by the General Counsel and Local 400 and was remanded to the Regional Director. I have therefore removed the case name from this proceeding.

[2] The charge in Case 5–CA–22706 was filed on May 5, 1992, and amended on June 18, and a complaint was issued on June 19. The charge in the now-severed Case 5–CB–7217 was filed on June 9, and a complaint issued thereon on July 23. The cases were consolidated by an order issued by the Regional Director on August 12, and, on September 28, certain issues in Case 5–RC–13708 were also consolidated into the proceeding. An amendment to the complaint in Case 5–CA–22706 was issued on November 3, and that complaint was again amended at the hearing.

[3] All dates hereafter refer to 1992, unless otherwise noted.

[4] Two of these are the employees alleged to be 8(a)(3) discriminatees, who, if found to have been unlawfully discharged, are entitled to have their ballots opened and counted. The challenge to the third ballot referred to me by the Regional Director was withdrawn at the hearing by the Union.

FINDINGS OF FACT[5]

I. FACTUAL SETTING

Respondent operates a national chain of discount stores handling all manner of food and nonfood items. We are interested in the facility located at Woodbridge, Virginia, which opened for business on October 18, 1991. Its initial work force consisted of around 250 employees,[6] which later declined, in around April 1992, to about 160.[7]

The general manager of the store at material times was David Roland, who has since moved on to another BJ's store. While at Woodbridge, Roland had an assortment of supervisors and middle managers under him, who will be referred to as appropriate. Roland reported for human resources guidance to Respondent's headquarters in Natick, Massachusetts, and more specifically to Tom Davis, vice president of human resources, and Ellen Brady, a regional human resources manager.

In January, employee Michael Riley and another employee made contact with a representative of Local 400, with the objective of forming a union at the Woodbridge store. The Union held a meeting on January 21 attended by Riley and some 10 or more other employees, all of whom volunteered to serve on an organizing committee. News of the union campaign came quickly to General Manager Roland (''the tail end of January'') and the complaint alleges that, as the campaign unfolded, Respondent violated Section 8(a)(1) of the Act in various particulars, and also violated Section 8(a)(3) by discriminatorily issuing a warning notice to one employee, and discharging two union partisans, in April and May. Nonetheless, the Union and the Respondent agreed on May 8 to hold an NLRB election on May 22, the tally of which, setting aside for now the two alleged discriminatees' challenged ballots (assuredly cast in favor of the Union) and the third challenged ballot (undoubtedly an antiunion vote), shows the Union ahead by 1 vote, 68–67.[8]

The 8(a)(1) allegations of the complaint, as translated into real-world-ese by the evidence, do not portray an employer blatantly bent on terrorizing the employee complement into rejecting unionization. No persistent assault of threats of loss of employment, store closure, or diminution of benefits appears in this record. There are a few scattered incidents which constitute unfair labor practices, but, so far as the record shows, this Employer did not engage in the kind of 8(a)(1) blitzkrieg frequently found in these cases. We turn to the alleged 8(a)(1) violations.

II. THE ALLEGED 8(a)(1) VIOLATIONS

A. The complaint alleges that since on or about November 5, 1991, Respondent has maintained an unlawful no-solicitation and no-distribution rule.

As set out in the ''Team Member Guide'' distributed to employees:

> BJ's supports certain nationally recognized charities such as the United Way, and permits such charities to conduct periodic in-club fund raising campaigns. However, there is to be no solicitation, canvassing, or distribution of literature by team members in BJ's Wholesale Club while working.

In *Our Way, Inc*., 268 NLRB 394 (1983), the Board held, in essence, that rules prohibiting solicitation for a union during ''working time'' imply with ''sufficient clarity that employees may solicit on their own time,'' while rules proscribing such activity during ''working hours'' are presumptively not precise enough to convey to employees that they are free to use meal and breaktimes for soliciting. Counsel for the General Counsel contends on brief that the phrase ''while working'' is ambiguous and could easily be construed by employees to include such nonworking time as breaks. She argues, therefore, that Respondent violated Section 8(a)(1) by maintaining this rule.

Respondent on brief refers to this store rule, but simply characterizes it as ''lawful,'' and advances no argument in support thereof. Respondent instead addresses what it refers to as an allegation, discussed infra, that General Manager Roland ''orally expanded its lawful written rule.'' That the complaint intends to assert that the maintenance of the written rule is itself a separate violation seems clear enough; see complaint paragraphs 9 and 13.[9]

The legal issue, like the precedents, calls for speculation of the highest magnitude. I am inclined to think that if, as in *Our Way*, supra, a prohibition during ''working time'' adequately connotes that employees are free to solicit during the nonworking portions of that working time, then ''while working'' can a fortiori be construed to mean that these same discerning employees may solicit while *not* working.

In accordance with the foregoing discussion, I recommend dismissal of this allegation.

B. The complaint alleges that at some time during the campaign, General Manager Roland ''expanded the no-solicitation rule . . . by stating to employees that he would not allow any solicitation of any kind, at any time, inside his store or on his property.''

When asked at the hearing whether he told employees at a Friday employees' meeting that ''there was to be no solicitation on BJ's property or at BJ's store at any time,'' Roland stated that he ''may have said that.'' He said that this was probably in February, in response to ''the organized activity in the parking lot'' by Local 400. Assistant Manager of Operations Mark Wells also testified to his understanding that in January, the policy of no solicitation on Respondent's property applied to ''even employees.''

Employees Kenneth McLaughlin, Michael Clark, former employee John J. Navarro, terminated employee David Orndorff, current employee Earl Carpenter, and terminated employees Michael Riley and Anthony Kelley gave varying but

[5] For purposes of clarity and accuracy, certain errors in the transcript have been noted and corrected.

[6] Also referred to by Respondent as ''associates'' and ''team members.''

[7] So testified General Manager Roland, who was at the store when it opened. Oddly, Assistant Operations Manager Mark Wells testified that the average employee complement between October and May was 235–250, working on 6–7 shifts. Later, however, he said that between January and May, it was ''maybe 175 to 200.''

[8] At the hearing, the Union withdrew its challenge to the latter ballot, as earlier noted.

[9] It could be argued, however, that since par. 13 asserts that Respondent maintained the rule ''to discourage its employees from forming, joining, and assisting the Union or engaging in other concerted activities,'' and since the record contains no evidence of any such motivation, the General Counsel has not carried his burden.

supportive testimony about Roland making such a broad statement at an employees' meeting during the campaign.

With Roland's concession that he ''may have said'' that there was ''to be no solicitation on BJ's property or at BJ's store at any time,'' together with the testimony of Manager Wells and the employee testimony, a violation of the law seems apparent, because employees are presumptively privileged to solicit union support on company property during their breaktimes. *Our Way*, supra.

Respondent argues that, even if Roland erred, the mistake was of no consequence, pointing primarily to an incident occurring after the statement was made, perhaps in late March or early April, when employee Earl Carpenter and other employees handbilled for the first time in front of the store. Four managers approached the employees and said that no solicitation was allowed at the store. The employees protested, and Roland was called. After he ''checked on it,'' Roland came back several hours later, apologized to Carpenter, and told him that he was ''correct.'' Handbilling by employees thereafter occurred on ''numerous'' occasions without prohibition.

Although the visible allowance of handbilling undoubtedly indicated to many employees that the no-solicitation ban was not being applied as broadly as it had been stated, it still did not make clear to employees that all solicitation (e.g., in breakrooms) on nonworking time was permissible. Moreover, Respondent's failure to timely and expressly communicate to employees where management had gone wrong and what rights the employees actually possessed was a far cry from the requirements of *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). See also *Ichikoh Mfg.*, 312 NLRB 1022 (1994).

I find a violation of Section 8(a)(1), as alleged.

C. The complaint alleges that on April 2, Assistant Merchandise Manager Steven G. Wegleitner unlawfully told employees that union solicitation was not allowed in the building at any time, and that he ''disparately enforced'' the written rule by confiscating union literature from tables in the breakroom and from the hands of an employee.

Kenneth McLaughlin testified that around April, he was in the breakroom when he saw Manager Wegleitner enter the room. Union literature was stacked on the tables. Anthony Kelley was reading a piece of the literature. Wegleitner allegedly gathered up the literature, took the piece from Kelley's hands, and walked out with the material. Michael Clark gave rather similar testimony,[10] as did terminated employee David Orndorff[11] and Anthony Kelley. In addition to basically reaffirming the testimony of other employees, Kelley stated, as Orndorff did, that Kelley told Wegleitner that he wanted his pamphlet back, and Wegleitner said ''there is no soliciting on company property.''

The following day, according to Kelley, he spoke to Roland, asserting his legal right to be in possession of the pamphlet on breaktime. Roland said that he, Kelley, Wegleitner, and Ellen Brady, the field human resources manager from the home office in Massachusetts, would discuss the matter after lunch. No such meeting occurred. Brady, however, did come to where Kelley was working and they had a conversation in which Brady, who had been present in the room, denied that Wegleitner had taken the pamphlet from Kelley's hand.

Sometime thereafter, Kelley saw Wegleitner and asked for the return of his pamphlet. Wegleitner said that he, Kelley, and Roland would get together, but nothing came of it.

Brady, then on a visit to the Woodbridge store, 1 of the 23 stores under her supervision, testified that while seated across a table from Kelley in the breakroom, she picked up a copy of the union booklet and then he followed suit. After some brief conversation, Wegleitner walked in and began picking up the brochures from the table. She then observed Kelley put down his copy and Wegleitner pick it up. Brady testified that she heard Kelley say to Wegleitner something like ''Why didn't you take it from her?'' (Brady was still holding the copy she had picked up.) Wegleitner replied to the effect that it was ''because she's holding it.'' Brady denied that Kelley otherwise remonstrated with Wegleitner.

Sometime later, according to Brady, while she was in the training room discussing benefits with Kelley, as he had requested, Kelley showed her a pamphlet with a title such as ''I Know My Rights'' and said that he wanted an apology from Wegleitner because ''he took the book out of my hands.'' Brady denied that Wegleitner had done so. They continued to insist on their various positions. She admitted saying to Kelly that he may have ''perceived'' the book being taken from his hands, but repeated that it had not happened.

Wegleitner admitted that he picked up the brochures in the breakroom, but denied pulling one from Kelley's hands. He agreed with Brady that Kelley had asked why Wegleitner had not removed the brochure from Brady's possession and that he had replied that ''she had it in her hand.'' Wegleitner denied telling Kelley that there was to be no soliciting in the building. When asked why he removed the brochures, Wegleitner answered, ''It was laying all over the tables and I just picked it up.'' Brady testified, however, that the pamphlets were in ''a stack in the center of the table.'' Wegleitner subsequently stated that he had cleaned off the breakroom tables previously, and admitted that he had first gone to a bulletin board in the breakroom and removed a union sticker before he took the brochures on the day in question here.

Kelley was, in general, not a particularly impressive witness, and there were a number of inconsistencies, perhaps to be expected after a lengthy time period, between his testimony and that of his supporting witnesses. As to the question of Wegleitner snatching the brochure out of his hand, however, he was rather convincing, and his attempts to follow up on this indignity (deemed ''obsessive'' on brief by Respondent) suggest that he was truly offended by an actual incident. Although I had no particular impression of Wegleitner during his brief appearance, I thought Brady seemed a most credible witness. At the same time, the General Counsel's witness, McLaughlin, also made a good impression. There is no clear enough route to the truth here to allow me to find that Wegleitner grabbed the pamphlet from Kelley's hand. See Section 10(c) of the Act.

[10] Clark, however, said that he had been conversing with Wegleitner for 5–10 minutes before the grabbing occurred, and he made no reference to Wegleitner picking up the pamphlets from the tables.

[11] Orndorff testified, contrary to Clark, that Wegleitner was only in the room for moments before he began picking up the literature. He also said that when Kelly complained, Wegleitner said, ''There is not going to be any soliciting in the building.''

Wegleitner did, however, gather up the union literature and remove it, an action referred to in the complaint as ''confiscation.''[12] There was no apparent practical need to do so; Brady, contrary to Wegleitner, agreed that the brochures were stacked, not ''laying all over the tables.'' Wegleitner conceded that employees are allowed to read ''newspapers, magazines, pamphlets'' in the breakroom. Although he testified that on other occasions, he had cleared off ''scattered merchandise'' from the breakroom tables, these brochures were not ''scattered.'' Furthermore, there is no indication that Wegleitner or any manager had ever previously entered an employee-filled breakroom and removed all the reading material. Whether or not Wegleitner actually stated aloud that there was no soliciting allowed in the breakroom—and I cannot be sure of this—his actions reasonably conveyed to employees such a message, in the context of their certain knowledge that reading of other materials was not forbidden. I therefore find that, by removing the pamphlets for no obvious neutral reason (after first removing a union sticker from the bulletin board), Wegleitner effectively communicated to the employees in the breakroom that the room could not be used for purposes of union solicitation or distribution of literature.[13]

D. The complaint alleges that on January 21, Respondent on two occasions unlawfully created the impression among its employees that union activities were under surveillance.

Jane Delimba, presently employed by Respondent, testified that on January 21, the day of the first union meeting, she punched in on the timeclock at 6 p.m. The timeclock is at the bottom of a flight of stairs leading up to a walled office area in which are located General Manager Roland, Assistant Manager for Member Services Jessica Nelson, and some other personnel. Delimba testified that she heard Roland and Nelson speaking. Nelson said that ''they would like to find out where the Union meeting was taking place that evening,'' and Delimba allegedly also heard Roland on the telephone saying that ''they had gotten rid of one person that was causing the troubles at BJ's, the Loss Prevention Manager or a supervisor.''[14]

That evening, Delimba was working as a cashier in the concession area of the store. She testified that about 6:15 p.m., she saw Roland, Nelson, Customer Service Manager Sandra Hardeman, and Personnel Manager Leroy Singleton having their briefcases checked by a security guard as they were about to leave the store. From approximately 5 feet away, she allegedly overheard Hardeman say that they had to follow employee Michelle Hammett ''because she knew where the meeting was, the Union meeting.''

Jessica Nelson described the physical structure of the office area, and the ambient noises, to be such that no one standing at the timeclock could overhear what was said in the office area unless it was shouted by someone leaning over the wall surrounding the area. She further denied hearing or making any of the statements to which Delimba testified, both in the office area and near the door. Roland also denied ever making or hearing the statements alleged by Delimba. He said the acoustics in the building made it impossible for anyone downstairs to hear anything said upstairs.

Sandra Hardeman also denied making a statement to other managerial officials that they had to follow Michelle Hammett to a union meeting. She further denied knowing about the first union meeting before it was held. Michelle Hammett was a cashier under Hardeman's direction at the time, but Hardeman assertedly did not know that she was a union supporter.

Singleton testified that Hardeman never made the statement attributed to her by Delimba in his presence.

The resolution of the factual dispute here is not an easy one. Delimba made a very good personal impression; she is currently an employee of Respondent and therefore might reasonably be expected not to unnecessarily lie about Respondent's behavior and thus gratuitously incur its wrath; and apparently she had nothing directly to gain from prevaricating. On the other hand (there is virtually always another hand), Delimba's testimony was inconsistent more often than seems normal, and other factors, such as the unlikelihood of her being able to both hear and *see* Roland and Nelson from the timeclock, given the uncontradicted testimony about the physical layout, make me wonder.[15] Respondent also argues that Delimba seemed to be saying that she heard Roland *and* Nelson conversing and Roland speaking on the telephone at the same time, both making incriminating remarks in the brief space of time in which she punched in.[16]

What I find most jarring (curiously, Respondent does not advert to it) is the unlikelihood that such activities would have taken place (and both within hearing of a single employee). Would four top managers, including the general manager, go stalking into the night with the intended purpose of following (presumably surreptitiously) Michelle Hammett because she knew where the meeting was? This strikes me as simply improbable.

There were testimonial problems on the other side. Both Jessica Nelson and Sandra Hardeman professed a lack of interest in the union activity, which seems doubtful, and Hardeman testified that Roland never asked her the union status of her employees, but only said that the union activity ''was nothing for . . . middle level managers to be concerned with,'' while Roland testified that he met with his

[12] I note that at p. 82 of Respondent's brief, the claim is made that ''Kelley himself admits that Wegleitner had previously removed other discarded Union literature from the table''; the citations, however, are to testimony by Brady and Wegleitner.

[13] In *Heartland of Lansing Nursing Home*, 307 NLRB 152 (1993), cited by the General Counsel, the administrative law judge found a violation based on removal of union literature from a breakroom, but the Board specifically noted, id. at fn. 2, that no exceptions had been filed to this finding, which suggests that the Board was not lending its imprimatur to the conclusion.

[14] This was an employee named Chrissy Johnson, who had been discharged that day. The fact that Delimba's affidavit states, ''I did not hear *anything else* that night about the Union or Crissy [sic] Johnson'' (emphasis added), was clarified by her testimony on redirect that her affidavit does refer to the later incident at the door, as discussed hereafter.

[15] Delimba made clear on direct that she could not see Roland and Nelson, but recognized their voices (Tr. 131–132). The General Counsel so interprets Delimba's testimony (Br. 5–6). (''She could not see the individuals talking, but recognized their voices.''). But on cross-examination, Delimba testified that she could ''see Mr. Roland and Ms. Nelson as they spoke'' (Tr. 152).

[16] Strictly, her testimony does not *have* to be construed as a conversation between the two; it could have been Roland on the telephone and Nelson speaking to some third person. But, as noted, Delimba said that she saw the two ''as they spoke.''

midmanagers, including Hardeman, and asked them to ''be aware and to know which employees were interested or involved in union activities.'' Roland was a cautious and often inconsistent or surprisingly distanced witness, and I found Singleton to be not at all worthy of trust.

As a current employee, Delimba is, according to Board precedent, entitled to some quantum of credibility when she testifies against her employer. *Stanford Realty Associates*, 306 NLRB 1061, 1064 (1992), and cases cited. In addition, as noted, she made a good personal appearance. But aside from the difficulties presented by her testimony, not all of which are referred to above, the probability of Delimba overhearing such expressions of employer scheming by the very highest ranking supervisors twice in 1 day is exceedingly remote. While, as the General Counsel points out, there are reasons for not trusting Respondent's witnesses, it is the General Counsel's burden under Section 10(c) of the Act to prove his case by ''a preponderance of the testimony taken,'' and I cannot say that he has done so here.

I therefore recommend dismissal of the foregoing allegations.

E. The complaint alleges that at various times since January 21, Personnel Manager Singleton interrogated employees about their union membership, activities, and sympathies.

Delimba testified that a couple of weeks after the first union meeting, while working in the health and beauty aids department, Singleton approached and asked her how she felt about the Union. She said that she was very much in favor of it. Singleton replied that if she felt things were bad at the store, ''they would get even worse once a Union got in, because BJ's has got an open door policy now and we wouldn't be able to use that open door policy; we'd have to talk to a shop steward.'' The discussion then turned to the discharge of Chrissy Johnson, whom Delimba thought had been unfairly dismissed.

Singleton denied that he had questioned Delimba about her attitude toward the Union. Because the statements attributed to Singleton by Delimba do not sound like something Delimba could have fabricated, here, I credit her.

None of the discussion other than the questioning of Delimba's feelings about the Union is alleged to be violative. The test of coercive interrogation is whether, taking into account all the circumstances, the questioning reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act. *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985) (former Member Dennis dissenting). The facts in *Sunnyvale*, which dismissed the interrogation allegation, were stronger for finding a violation than those here. In *Sunnyvale*, the personnel director ushered the employee (who had handed in a dues-deduction card) into her office, shut the door, and asked her why she had joined the Union (in this case, the employee was approached by her supervisor at her work station). The *Sunnyvale* employee said that the employees needed help (in this case, Delimba said that she was very much in favor of the Union). In *Sunnyvale*, the supervisor asked if the employee's decision was based on any personal animosity to the supervisor (there is no parallel here). In *Sunnyvale*, the supervisor stated that the company ''wanted the union out of the clinic'' and that the presence of a union would not necessarily ensure that the employees would get what they wanted (here, Singleton referred to the fact that employees would have to deal with the Respondent through a steward). In *Sunnyvale*, the supervisor asked why the employees had not gone to her first, and was told that they had, and that nothing had been accomplished (there is no parallel here). The *Sunnyvale* employee called the conversation ''friendly'' and ''casual.''

If the *Sunnyvale* questioning was not violative, I do not see how the present facts can be. This questioning took place at the employee's work station and elicited an honest answer. It appears to have been merely a preliminary to a lawful lecture about the effect of selecting a union, and not an attempt to pry into a secret (which Delimba readily disclosed). Although determining what constitutes ''coercive'' interrogation is often a close, and almost visceral, call, I would think, as the Board majority did in *Sunnyvale*, that these facts do not suffice. There are very likely prior cases which have reached a different result on similar facts.

I recommend, therefore, that this allegation be dismissed.

F. The complaint alleges that Singleton again interrogated employees and also ''threatened its employees with job loss if the Union got in and the employees went on strike against Respondent.''

Delimba said that she had ''frequent'' conversations thereafter with Singleton, but she particularly remembered one just before Easter, in which Singleton took Delimba and Michelle Hammett off the cash registers and led them to the breakroom. There he asked them their views about the Union and said that if the Union won the election, ''they could not guarantee our pay, or either raises, but he said that they could take and lower our wages if the Union came in.''[17] After being prompted, Delimba recalled that Singleton had also mentioned the possibility of strikes and how, in the present economy, ''they could get a lot of employees to replace us.'' She further testified that she and Singleton, with whom she had a ''good relationship,'' had other conversations about strikes and employees being replaced (they ''did talk straightforward about the Union''), but he had never taken her away from work except for the occasion shortly before Easter. On cross-examination, however, she stated that between January 21 and May 2 (when she was injured), she had ''only two'' conversations with Singleton about the Union. She then blurred this contradiction by saying they had ''round-about'' conversations on that subject, and finally returned to agreeing that there were ''really only two'' conversations about the Union.

Singleton denied meeting with Delimba and Hammett in the breakroom and also denied talking about their union activity, strikes, and replacement.

Again, despite the softness in Delimba's testimony pointed out earlier, I am inclined to believe that here she is telling the truth; the language attributed to Singleton did not seem to be something that Delimba would have manufactured.

As for the interrogations, Singleton already had been told where Delimba stood and it is not clear why he should have asked her again; the record does not show if Hammett made any response. Like the preceding incident, Singleton's questioning about their views, in an employee breakroom with which Delimba and Hammett presumably were familiar and felt comfortable, appears only to have constituted opening remarks made to determine whether it was necessary to try to propagandize against the Union.

[17] This remark is evidently not alleged to be coercive.

As for the references to strikes and replacements, counsel for the General Counsel does not argue that Singleton implied that strikers could be permanently terminated by striking; as indicated alone, Singleton did not, according to Delimba, refer to ''permanent'' replacement or employees ''losing'' their jobs. See *Baddour, Inc*., 303 NLRB 275 (1991). The General Counsel argues instead all of the circumstances—the removal from the work area, the interrogation, the ''frightening talk about strikes,'' and the lack of ''objective facts to show that if the Union won the election, there would probably be a strike.''

The Board has long held, however, that references to strikes and their consequences are within the protection of Section 8(c) of the Act, even when the possibility of replacement is not accompanied by an explanation of replaced employees' poststrike rights under the doctrine of *Laidlaw Corp*., 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1979). *Care Inn*, 202 NLRB 1065 (1973); *Eagle Comtronics*, 263 NLRB 515 (1982); *Fiber-Lam, Inc*., 301 NLRB 94 (1991). Here, Singleton did not even threaten the employees with ''permanent'' replacement, which the precedents would find to be permissible. A single allusion to the possibility of a strike, without any suggestion that employees would be deprived of *Laidlaw* rights, is not violative of the Act.

I recommend dismissal of this allegation.

G. The complaint alleges that on two occasions, Respondent's agents instructed employees to request the Union to return their signed authorization cards.

Alleged discriminatee Anthony Kelley testified that at a regular Friday employees' meeting, General Manager Roland told the employees that ''he didn't know what we were doing by signing these cards, but our best bet would be to get the cards back.'' No other employee so testified.

Roland testified that during one of the Friday employees' meetings, he mentioned that a few employees had approached him about how to retrieve their signed cards from the Union, and stated that if anyone was seeking such information, he could furnish it. He subsequently gave a telephone number and an address to employees who inquired.

I do not trust Kelley's memory of a long-past meeting sufficiently to conclude that Roland said that the employees' ''best bet would be to get our cards back.'' Whether it is true or not that some employees had approached Roland for information about retrieving cards is irrelevant for, as Respondent points out, the Board held in *R. L. White Co*., 262 NLRB 575, 576 (1982):

> An employer may lawfully inform employees of their right to revoke their authorization cards, even where employees have not solicited such information, as long as the employer makes no attempt to ascertain whether employees will avail themselves of this right nor [sic] offers any assistance,[5] or otherwise creates a situation where employees would tend to feel peril in refraining from such revocation.

[5] The mere publication of the addresses of the Union and the Regional Office does not constitute unlawful assistance. See *Tartan Marine Company*, 247 NLRB 646, 655–656 (1980).

Accord: *Mini-Togs, Inc*., 304 NLRB 644 (1991).

So far as the record shows, Roland acted within the confines of the law.

At some unspecified time, according to Kelley, Night Replenishment Manager Robert Jackson and Kelley sat in Jackson's office having ''just a basic conversation at first about work.'' They began talking about union cards. Jackson said that the Union would not give a card back, and stated, ''[A]sk and see if they will give you your card back and I bet they don't, and that was pretty much the extent.''[18]

Jackson, no longer employed by Respondent, did not testify. It seems quite clear from Kelley's own testimony that the two were simply taking opposing viewpoints on the hypothetical question of whether the Union would return a card if asked. Although the complaint alleges that Jackson ''instructed'' Kelley to request return of Kelley's card, on brief the General Counsel seems to agree that Jackson was merely challenging Kelley to test the Union; the brief states, ''The obvious purpose of these remarks was to disparage the Union and to convince Kelley that the Union was unworthy of his further support.'' When the day comes that it is unlawful to make an effort to convince employees that the union is unworthy of support, we will be operating under a new statute. I recommend dismissal of this allegation.

H. The complaint, as amended, alleges that on January 22 or 23, Supervisor Ronald Levin unlawfully interrogated employees about their union activities and sympathies.

Earl Carpenter, a current employee, testified that on the day after the first union organizing meeting on January 21, Assistant Merchandise Manager Levin approached him on the work floor. Levin asked Carpenter what was going on, saying that, contrary to past experiences, groups of employees were dispersing when Levin approached. Carpenter said that he had no idea.[19]

A few days later, Levin again approached, saying, ''Okay, Earl, let's cut the bullcrap. I know about the Union and I know about the blue cards.'' Levin then asked Carpenter if he had signed a card and Carpenter admitted that he had. Levin told Carpenter that the union card was a legal contract, and Carpenter responded that he had ''worked for union shops and non-union shops before and I know what I'm doing.'' Carpenter testified on cross that, by the time of this conversation, he had handed out authorization cards in the breakroom.

Levin testified that in January, shortly after the January 21 union meeting, Respondent was presenting weekly programs to employees about ''the benefit of the week.'' Carpenter, while working, had a question about the current benefit being promoted. After answering the question, Levin ''continued the conversation'' by talking about how, in a union environment, there would be negotiations in which there could be a possibility that all of those benefits would not be negotiated. Levin also brought up that the authorization cards were a legal commitment. He assertedly did not ask Carpenter if he had signed a card, or recall saying anything else to him about the cards. He did remember that Carpenter

[18] Respondent errs on brief in stating that Kelley added details to the conversation on cross-examination, namely, that Jackson asked him if he had signed a card. At the transcript page cited, Kelley was only questioned as to whether he had volunteered to Jackson ''at some point'' that he had signed a card.

[19] The General Counsel stated at the hearing that this encounter was not alleged to be an unfair labor practice.

talked about other jobs in a union shop. He also remembered saying to Carpenter that if he was discussing organization, he could not do it on the selling floor when employees were working. He further recalled that, 2 to 3 weeks *after* the conversation related above, he said something to Carpenter about people dispersing when he approached.

I am inclined to believe Carpenter's testimony over Levin's. Carpenter seemed an excellent witness (except perhaps for one flaw), somewhat better than Levin. Assaying the totality of the circumstances, however, I doubt that it would be appropriate to find coercion here. Levin, who said that he had a ''pretty good working relationship'' with Carpenter, approached Carpenter at his work station and very probably asked if Carpenter had signed a card as an opening remark in an effort to acquaint Carpenter with the significance of the cards. Thus, the conversation as a whole would not have seemed to Carpenter to be an effort to probe into his union leanings, suggesting hostility to those who had signed cards, but simply would have appeared to be a cautionary lecture. Carpenter promptly told Levin that he had worked in a union shop previously and knew what his rights were. Carpenter was an early and ardent union advocate and, when handbilling began, participated in the activity ''numerous times.'' He also was no blushing violet. On two disciplinary notices, Carpenter wrote that he thought he was being discriminated against because of his union activity.[20]

On these facts, I am dubious that there reasonably inhered any element of coercion.

III. THE ALLEGED VIOLATIONS OF SECTION 8(A)(3)

The complaint, as amended, alleges three violations of Section 8(a)(3): a warning notice issued to Michael Riley on January 22; the April 10 discharge of Riley; and the May 1 discharge of Anthony Kelley. We will turn first to the Riley allegations, which encompass material also applicable to Kelley.

A. *The Allegations Relating to Riley*

Michael Riley began employment at BJ's in Woodbrige in September 1991, working on the 4 a.m.–12:15 p.m. shift. He and employee Chrissy Johnson made the call to the Union in early January which triggered the organizing campaign. At the first employee meeting on January 21, an initial in-plant organizing committee of 17–20 employees, of which Riley was selected cochairman, was formed. Riley engaged in the usual activities associated with an organizer, including handbilling outside the store not long before he was discharged. Almost from the start, he wore a full array of union regalia.

On January 23, Replenishment Manager Jackson presented Riley with a corrective interview (CI) noting that Riley had been absent from work four times, and more than 15 minutes late one time, in the months of December and January.[21] One of the four absences (which had occurred on December 1, 15, 16, and 23) had been excused, so Riley was assessed 3-1/2 points (one point for each absence, and one-half point for the tardiness) under the point system to be discussed hereafter.

According to Riley, the form had both the blanks for ''Verbal Warning'' and ''Written Warning'' checked. Riley asserted, and Personnel Manager Singleton denied, that after a discussion with Singleton, the ''written warning'' checkmark was whited out by Singleton. Singleton testified that he recalled no such incident, and while a subsequent unearthing of the original CI showed that such deleting had occurred, it further turned out that the same mistake and deletion had been made on several other CIs issued at the same time. Singleton also signed Riley's form as ''Supervisor,'' although he was not; he testified that the blank should ordinarily be signed by the employee's immediate manager; that he ''rarely if at all'' signed such a form; and that he could not remember why he signed Riley's (he was sure that he did not attend the interview with Riley). Finally, Riley allegedly complained to Singleton that he was being unfairly penalized for the December 1 absence, since he assumed that the absenteeism system had not gone into effect until December 9; removal of the December 1 absence would leave Riley with only 2-1/2 points, or less than required for a written ''verbal'' warning. In response, Singleton allegedly took out an attendance log, perused it, and told Riley that he had two other uncounted tardinesses which would equal one point and thus give him a total of 3-1/2 points anyway. Singleton denied having done so. It is not clear from the record when in fact the absenteeism program was officially to have been put into effect, if it was thought about at all.

The written attendance program provided a point system for ''Absence Occurrences.'' Generally speaking, unapproved or unexcused absences, and tardinesses of more than 15 minutes, resulted in an assessment of one point (or in the case of tardiness, one-half point) against the delinquent employee. Flexibility in excusing absences was vested in local authority: ''external circumstances, such as [*but not limited to*] weather, carpools, public transportation must be handled with discretion by local management'' (emphasis added). Although the written policy does not specifically state that employees who are going to be tardy or absent must call in by any certain time, the ''Team Member Guide'' given to employees states that in such circumstances, they ''must'' call in at least 2 hours before their shift is to begin.[22]

[20] The test of whether a comment or question is violative is whether it would ''reasonably'' tend to coerce employees. Sometimes, as in *Sunnyvale*, supra, the Board makes reference to the nature of the relationship between the supervisor and the employee (''Easterly and Rothweiler had a friendly relationship,'' 277 NLRB at 1218), and sometimes it criticizes references to such personal factors or characteristics, pointing to the test of ''reasonableness.'' *Coach & Equipment Sales Corp.*, 228 NLRB 440 (1977); *Sage Dining Service*, 312 NLRB 845 (1993). It seems to me that when an employee objectively manifests that he is not afraid of revelation of his union sympathies, that is an appropriate fact to consider in assessing ''reasonableness.'' Indeed, the panel majority so indicated in *Sunnyvale*, supra at 1218 (''First, although Rothweiler was not an open and active union supporter, she was also an employee not especially intent on keeping her support for the Union hidden from the Respondent'').

[21] This CI is the only one of three received prior to Riley's termination which is alleged to be violative of the Act.

[22] This rule, Respondent's witnesses conceded, could not apply to employees on the 4 a.m. shift because there would be no one at the store at 2 a.m. to take the calls. The record indicates, however, a general understanding by employees that if they expected to be late or absent, they were to call in as soon as possible to convey that information to Respondent. But the record also shows that even supervisors had no clear idea of the existence of a ''two-hour'' rule.

While the purpose of having employees call in *prior* to the shifts they would miss or be late for would seem to be so that Respondent could bring in off-duty employees or make some other arrangement, General Manager Roland testified that employees who called in as a late as 6 hours into what was to have been their shift ''could still be handled'' as a one-point ''unexcused absence,'' instead of a ''no call/no show'' (NC/NS). He subsequently testified, moreover, that even when an absent employee has not called in at all, he still could be given an ''excused absence,'' depending on the ''circumstances.''

The original document issued to employees treated an NC/NS as a two-point occurrence, but when the Woodbridge store became aware that this deviated from the corporate manual, it issued a revised edition of the absentee rules around January 24, 1992, giving NC/NS separate treatment as follows:

> If an associate fails to report to work and to notify the appropriate authority, he/she will be placed on probation immediately and will be given a written warning. Another ''NO CALL/NO SHOW'' within sixty (60) days will automatically result in the associate's dismissal.

It should be noted that this provision assesses no points specifically, although that would seem to be implicit.

On the other hand, when only points for unexcused absences and tardiness were concerned:

> Upon the accumulation of 3 points in a six month period the associate will receive a verbal warning. Another point (fourth point) in the next 60 day calendar period will lead to a written warning and probation. Associates who maintain perfect attendance with no additional points in that 60 day period will go off warning for probation. If a fifth point occurs during the 60 day probationary period, this *could* result in immediate termination. [Emphasis added.]

Thus, there is, *in theory*, an enormous difference between not-showing-up and not-calling-in and not-showing-up but calling-in, say, just before the missed shift is over. In the first case, according to the rules, two NC/NSs within a 60-day period automatically require termination. But in the second situation, an employee who misses a shift but calls in late five times in 8 months ''could'' be subject to termination.

On its face, the NC/NS record of Riley, as described hereafter, might arguably be, if the attendance system were strictly applied, a legitimate basis for discharging him. But the evidence shows that the system was only applied randomly and with leniency, and that the disparity between the treatment of Riley and other employees raises serious questions about the reason for his discharge.

To understand this conclusion, a good deal of background material is required. Under Respondent's attendance system, each employee's assigned weekly schedule is entered into the computer. If the employee does not punch in on a scheduled day, the weekly transaction schedule for that week, showing each scheduled employee's attendance, will print out an ''np.'' If the employee has had a schedule change, so that he works on an originally nonscheduled day, an ''ns'' (for ''not scheduled'') should appear on that day, and *may* serve as an explanation for an ''np'' also shown that week. (Tr. 1276.)

For employees who call in to announce that they cannot be at work on a particular day, or will be late, a ''Sick and Tardy Report'' is maintained in Personnel Manager Singleton's office.[23] Such a call may be received by the opening manager who is on duty starting at 3:30 a.m. and who may make a note of the call for later entry in the sick and tardy log, usually giving the time and nature of the call; or by other managers who happen to take calls; or by Personnel Manager Singleton or his assistant, Melissa Gorham. Other absences, even though not initiated by an employee phone call, might also be entered, although evidently without regularity. Singleton testified that, for both attendance and payroll purposes, it was his and Gorham's responsibility to find out why an employee was absent. The information would be placed on the employee's individual sick and benefit record card ''sometime within that week.''

Gorham was responsible for monitoring and keeping up with the attendance in order to prepare any necessary CIs. If an employee was shown as having an ''np,'' the personnel office would attempt to track down the reason for the absence, if it had not already been recorded. Once the reason was determined (such as a schedule change approved by a supervisor), it would be logged in. Any dereliction (late, unexcused absence, NC/NS) would also be recorded on a ''Sick and Benefit Record Card'' maintained for each employee, noting their various delinquencies on the appropriate dates in a 12-month period. (See G.C. Exh. 7.) Roland testified that Singleton would bring the ''trouble'' records to him a ''minimum'' of once a week (he defined ''trouble'' as meaning anyone with ''three occurrences or the equivalency of three unexcused absences''; presumably, however, since an employee with more than one NC/NS in a certain time period was required by policy to be discharged, Singleton would also have made Roland aware of such employees).[24] The immediate supervisors would then speak to the ''trouble'' employees and issue CIs to them.

In addition, Assistant Operations Manager Mark Wells testified that he as well as the personnel office monitored time and attendance since he was ''responsible for making sure that they were trying to keep up with the records.''

The problem with the testimony given by Roland, Singleton, and Wells about their attempt to carefully monitor attendance problems and assiduously apply the attendance rules is the abundance of records indicating extreme laxity in these areas. In General Counsel's Exhibit 33, the General Counsel has compiled a list of the attendance records for 175 employees in the period December 28, 1991, through May 22, 1992, ''whose records and schedules show that they did not report for a scheduled workday [or workdays] appearing next to their name, nor did they call in to report that they would be absent for that scheduled workday.'' The number of such days per identified employee ranges from 1 to 20.

[23] Also, according to Assistant Operations Manager Mark Wells, a second list is maintained in another location, although, inexplicably, Singleton was not aware of the second one.

[24] Singleton added that when an employee has accumulated, e.g., two NC/NSs, either he, Gorham, or the employee's manager might notify Roland about such ''cases or individuals that may have particular attendance problems.

For almost none of these days did the employees receive discipline, according to the discipline records. In response to this summary, Respondent filed five exhibits, Respondent's Exhibits 17–21, the entire package purporting to explain or justify or dispute many of the entries in General Counsel's Exhibit 33. The General Counsel then surrebutted by filing two exhibits, General Counsel's Exhibits 37 and 38.

Much of the effort made by Respondent to challenge General Counsel's Exhibit 33 is not directly contradictory of that exhibit. Respondent presents various documents from which we are expected to infer the reasons for absences, but most of the explanations require the reader to speculate, such as assuming that because an employee at some time submitted a doctor's certificate, he also called in on the day of his absence or was unable to do so.

I have also taken into account the possibility that even though the call-in sheets may not expressly show, in the words of the General Counsel's explanation of General Counsel's Exhibit 33, that the missing employees ''call[ed] in to report that they would be absent for that scheduled workday,'' some of these employees may have done so, and the messages were for some reason not transferred to the call-in sheets. Other than urging that ''its attendance system was not perfect,'' Respondent does not make this argument on brief, and the testimony indicates that there were not many instances of such failure of relay. Assistant Operations Manager Wells could not recall any such personal error.[25]

Respondent further advances, in a terse footnote, the following contention:

> General Counsel's summaries of ''no punches'' (''NP'') on Respondent's computerized timekeeping system (G.C. Ex. 33, 37, 38) should not be confused with the disciplinary no-call/no-show violation. An NP may lead to a no-call/no-show depending upon an investigation of both documentary and other (e.g., verbal excuses) evidence.

Respondent argues, that is, that the mere appearance of an np on the computer printout showing that the employee did not punch in as scheduled does not establish a NC/NS violation. But if, as Respondent's evidence indicates, the employee also is not shown as having called in to explain his absence before the end of the shift, that should nonetheless constitute a violation of the call-in-prior-to-the-shift rule, perhaps excusable, however, by rare circumstances such as an automobile accident which rendered it impossible for the employee to contact Respondent.

Assistant Operations Manager Wells testified that the personnel employees spent 2 or 3 hours a day researching the missing punches. Having checked the sick and tardy report to see if absent employees had called in, they would also determine if changes of schedules had been made. Usually at the end of the week, they would do an update of each employee's sick and benefit card ''and go through it to see if anyone is at the point where progressive discipline would need to be administered.'' If such discipline was required for attendance violations, the personnel department itself would prepare the CI form for the appropriate manager to hand out.

In attacking General Counsel's Exhibit 33 with its several rebuttals, Respondent seemed to have put into evidence every conceivable document arguably bearing on the reasons why nps did not turn into NC/NSs: mostly notes to supervisors from employees asking for schedule changes, doctor's certificates, and accident reports. As indicated, however, even after consideration of all the documentation and other justifications proffered by Respondent, there still remains a considerable number of unexplained and unjustified nps which are not claimed to appear as call-ins on the sick and tardy reports. Moreover, many of the proposed justifications, such as medical certificates, do not suggest that the employees were too ill or injured to call in their absences prior to the beginning of their shifts. Respondent's reference, noted above, to ''verbal excuses'' indicates that excuses made *subsequent* to the absences, and not called in on the scheduled working days, may be sufficient to prevent issuance of an NC/NS CI, despite the strict wording of the rule and the insistence of Respondent's witnesses on the importance of enforcement. And Respondent's Exhibit 18 clearly shows, with its many references to entries on sick and benefit cards, but not to the sick and tardy reports, that the employees did not call in and thus get listed on the sick and tardy report, but rather later offered some excuse which was accepted and posted to their sick and benefit cards.

It thus may safely be inferred that many employees who neither called up nor showed up nonetheless avoided NC/NS violations. Indeed, as previously noted, Roland testified that in proper ''circumstances,'' NC/NS absences could be downgraded or excused despite the failure of an employee to call in before or during his shift. Given Roland's testimony that he discussed with Singleton once a week ''at a minimum'' the attendance problems that had cropped up, it appears that there must have been many NC/NSs which, for one reason or another, were simply disregarded.

In sum, the General Counsel has introduced an exhibit listing 175 employees who are shown on the printouts as (most of them on multiple occasions) not having punched in when scheduled, and who are not shown on the sick and tardy logs as having called in to notify management that they would be absent. From these documents, and others, the General Counsel has asserted the propriety of drawing an inference that all these employees on all these occasions were NC/NS who, according to the disciplinary records, received no discipline.

Respondent has reacted by introducing documents and facts as to many of these dates which, Respondent argues, should indicate justifiable reasons why the employees did not get written up. Many of these explanations require speculation and some are erroneous. But even putting aside the days which Respondent has attempted to rationalize, there remain many occasions as to which Respondent has proposed no explanation.

By my count, there were 71 employees who, aside from absences by them which the Respondent *has* tried to explain, were np-no call two or more times between December 28,

[25] The sick and tardy report appears to be theoretically designed just to reflect those tardy or absent employees who call in to notify management of their situations. The logs in evidence nonetheless occasionally contain entries indicating ''NC/NS.'' This obviously would mean that, although the employee did *not* call in, at some time during or after his shift, someone made a note on the sheet that the employee had neither come in nor called in. An examination of the sick and tardy report logs shows that this was evidently an erratic practice; in the case of the two alleged discriminatees, not all of their NC/NS appear on the logs.

1991, and May 22,[26] and Respondent has made no attempt in its rebuttal documents or in testimony to account for these occasions. The General Counsel finds that, aside from the two alleged discriminatees, only four employees received ''any kind of discipline that involved the no call-no shows.''[27] Of these 71 employees, 19 employees had as many as between four and eight here-unexplained nps (and most had, in addition, several now-disputed absences), and received no discipline at all. The absence rules, as set out above, make mandatory the termination of an employee who incurs an NC/NS for a second time in the probationary period following the preceding violation, and Roland testified that he ''believe[d] it to be'' true that two NC/NSs automatically led to dismissal.[28]

Considering the methodical program for the personnel office checking out absences and following up with Roland about them, it is obvious either (1) that a large measure of discretion was employed in determining when to discipline employees for NC/NSs or (2) that the personnel employees were hopelessly ill-prepared to do their jobs. Given that the task does not seem overwhelming, the first alternative seems the more likely.

Aside from alleged discriminatees Riley and Kelley, the Respondent discharged only five other employees for attendance problems from the opening of the store in October 1991 through May. Their cases differ significantly from those of the two alleged discriminatees, so far as the record shows:

Brian Dabney—Terminated December 18, 1991

1. Received a warning on November 4, 1991, for NC/NS on November 3, with a stern admonition that such conduct would not be tolerated.

2. Within his 60-day probationary period, Dabney: (1) reported to work late on December 9 and 16; (2) failed to report for work (and presumably did not call in) on December 10 and 17; and, on December 18, ''failed to follow his supervisor's request in a timely manner, thus walking away to go on break.'' He was discharged on the latter date.

Douglas Furr—Terminated on December 22, 1991

The termination report for Furr states, ''Doug has not shown for work or called off from work all week.''

Douglas Fenton—Terminated January 6

1. Fenton received a CI on October 30, 1991, but it is not in evidence. His CI of January 3, however, states that in the written warning which he had received on October 30, he had been notified that he ''must inform club management if you could not work your scheduled hours.'' Presumably, then, the October 30 warning was for an NC/NS.

2. The warning prepared for Fenton on January 3 states that Fenton did not ''report to work or notify club management of [his] absence'' on January 2 and 3. Levin and Roland put him on a 60-day probation.

3. Two days later, on January 5, Fenton had another NC/NS. He was terminated effective January 6.

Peggy Hughes—Terminated on April 6

1. On February 14, Hughes received a written warning for failing, on February 11 and 13, ''to report to work and also notify the appropriate authority.''

2. On March 18, Hughes received a warning for seven latenesses between December and March.

3. On April 6, Hughes was discharged for NC/NS on 4 consecutive workdays.

Jon Jeter—Terminated on April 13

1. Jon Jeter was a food manager who, on March 23, was placed on probation because of a ''check problem'' and because he was NC/NS on March 20 and 21. Due to his ''unprofessional conduct of a manager'' and ''violation of company policy,'' he was warned that ''Any further violation of policy and/or conduct *WILL* result in immediate dismissal.''

2. By letter of April 13, Jeter was discharged for leaving work at 11 a.m. on April 10 and not calling in or working as scheduled on April 11 and 12.

Thus, after January 5, and until the election on May 22, no employees were fired for attendance-related problems with the exception of Hughes and Jeter, whose circumstances obviously demanded it, and union activists Riley and Kelley.

The records in evidence show that, while these five discharges may easily be distinguished from the cases of Riley and Kelley as having more plausible bases, there appear to have been many, many instances in which violations of the attendance policies were tolerated and in which the policies themselves were ignored. The example of Brian Stewart chosen by counsel for the General Counsel is a good one.

Stewart is listed on the sick and tardy report for January 27 as ''NC/NS.'' The discipline file contains no evidence that he received any CI for that violation.[29] On February 11, he received a verbal warning for being absent from work twice in January and February; for NC/NS on January 14; and for being more than 15 minutes late on three occasions. Had he received warning and probation for his January 14 NC/NS, he would have been, pursuant to the rules, discharged on January 27. The call-in sheet for February 25 shows that the failed to call until 7 a.m. (his starting time was 4 a.m.), and when he called, he said that he had ''overslept not sure if coming.'' On April 8, he was late at 5 a.m. and made no call; on May 18 and 19, he is shown on the call-in log as NC/NS. Furthermore, judging from the summaries submitted by the parties, as earlier discussed, there appear to be at least seven other NC/NSs incurred by Stewart

[26] Fifty-seven employees by the General Counsel's accounting.

[27] The references here are to Gene Elliott, Doug Fenton, Rodney King, and Brian Stewart (G.C. Exhs. 35I, J, K, W, and KK). I find, as well, although they are not shown as np on the date for which they were disciplined on the General Counsel's first exhibit, that Earl Carpenter (35G), Jannet Grant (35O), Peggy Hughes (35R, T), Gerald McCarthy (35AA), Essie Riddick (35FF), Peter Supernaugh (35LL), and Christy Taylor (35 MM) also clearly (or sometimes arguably) fall into this category. I would thus arrive at a figure of 11 persons receiving discipline for NC/NS in the period given.

[28] He did not flatly say, as the General Counsel's brief says that he did, that the policy ''was always followed.''

[29] In R. Exh. 19, Respondent identifies Stewart as having a ''Not Scheduled'' entry appearing on the transaction report within the same week as his January 27 NC/NS, implying that he did not punch in on January 27 because his schedule had been changed. As the General Counsel points out in G.C. Exh. 38, however, the weekly transaction report shows nps on *both* January 27 and 28, and only one ns (on January 29).

between January and May. Except for the February 11 verbal warning, no discipline was ever issued to Stewart.

Giving Respondent the benefit of the doubt with regard to any conflict in the evidence pertaining to Riley, I am nonetheless persuaded that Riley was terminated because of his union activity.[30]

Riley's first CI covered unexcused absences on December 1 and 16 and January 5, and one lateness on January 21.[31]

On February 11, Levin and Roland signed a written warning for Riley based on two latenesses of more than 15 minutes on January 31 and February 7 and an unexcused absence on February 10. A review of General Counsel's Exhibit 35 shows that four other CIs, written by the same hand as Riley's CI, and generally relating to recent absences and tardiness, were also drawn up on February 11 for Michael Blackwood, Allicia Grothe, Jennifer Newton, and Bryan Stewart. Levin cordially discussed the CI with Riley; told Riley that he had no problem with Riley's work; and said that Riley was on probation and the CI was a reminder not to miss any more days if he wanted to avoid trouble.

More than a month passed without incident, and then, on March 21, Riley was NC/NS. His absence was occasioned by a rumor that the mother of his 2-year-old daughter, who was in his custody, was coming to abduct the child, so he took her out of town. Riley returned to work on his next scheduled day, March 23, but did not speak to Levin. Levin, however, approached Riley about his NC/NS, and Riley explained his domestic situation to him. Levin also spoke to Roland about the NC/NS and Roland discussed the matter with Tom Davis, the national vice president for human resources in Massachusetts. Roland testified that such discussions had been established for all discipline in view of the known union activity. Davis and Roland agreed that Riley should be talked to.

Respondent asserts on brief that under the attendance policy, it ''had the option to terminate Riley after his March 21 no-call/no-show.'' This is correct. Under the point system, a fifth point incurred during the probationary system ''could'' result in immediate termination. Respondent's past performance, however, as discussed above, obviously exhibited liberality in sympathetic cases, and it would have been contrary to that history to ignore the ''circumstances'' of Riley's March 21 NC/NS. Instead, Levin prepared a lengthy second written warning, dated March 25, for Riley, expressing sympathy with his personal problem, but also stressing the importance of keeping management informed, and threatening the possibility of further action, including termination, in case of recidivism.

It is worth noting here—indeed, it may be the single most important feature of Riley's case—that Wells, assistant manager of operations, testified that he was aware of the March 21 NC/NS because Levin had ''informed the management team at the time of what had happened with Mr. Riley.'' With the abundant number of NC/NSs disclosed by this record, it is a remarkable fact that Levin deemed it important to draw the attention of ''the management team'' to Riley's lonely NC/NS. At the least, this testimony leaves little doubt that the ''management team'' was focused like a laser beam on Riley's conduct.[32] Thereafter, however, Riley was permitted to leave early on April 1 and 5 to deal with matters arising out of the custodial problem.

On April 6, when he was scheduled for a shift beginning at 4 a.m., Riley did not come to work, but did call in 6 hours late, at around 10 a.m. He spoke to Supervisor Gathers, telling him that he had taken his daughter to a doctor because she had a cyst on her wrist and was running a fever. Gathers thanked him for the information.[33] The doctor would not accept Riley's insurance, however, so Riley had to make an appointment for the next day with another doctor. Riley testified that on April 6 and 7, he was staying at the house of a friend who had no telephone, so again on April 7 he did not call in until about 6 hours into his shift. He spoke to Personnel Manager Singleton and told him that he had made a medical appointment for noon (the call-in log reads, ''minor surgery on daughter 10:30'').

The record is unclear whether the information was delivered separately or collectively, but Roland testified that the no-shows of April 6 and 7 were, he believed, brought to his attention by Replenishment Manager Jackson (who apparently was Riley's immediate supervisor, see Tr. 45). Roland called Davis in Natick and, after a thorough discussion, recommended that Riley be discharged. Davis approved.[34]

[30] I have considered the evidence and arguments relating to Riley's first CI (written on January 22) as an alleged separate violation of Sec. 8(a)(3). For a number of reasons, including the fact that it seems questionable to me that Respondent would have known of Riley's participation in the formation of the union effort by January 22, the day after the first union meeting, and because the CI was proximately linked to Riley's last dereliction on January 21, I would not find a violation.

[31] Other documents in evidence indicate that January 22 was somewhat of a catchup day for Respondent. In the same handwriting as Riley's January 22 CI, and on the same day, employee Michael Blackwood received a ''verbal'' CI for two absences in December and six tardinesses in December and January. A similar January 22 document was prepared for Rodney King, collecting December and January absences and latenesses, by the same writer. It could be speculated that the other CIs provided ''cover'' for the one meted out to Riley, but I have no reason to draw that inference.

[32] Although Levin, in the warning notice, and Roland, in his testimony, stressed the passage of ''2-1/2 days'' with no notification to management, the fact was that Riley only missed 1 day—March 21—without calling in. He was not scheduled for March 22, and he came to work on March 23.

[33] The call-in list for April 6 confirms that Riley made such a call to Gathers at 10 a.m. and also quotes Riley as saying that he was ''sorry he didn't call early.''

[34] Roland's testimony as to discussion with Davis about the union sentiments of employees is less than consistent. Roland concededly held meetings with his mid- and upper-level managers regarding the Union, at which he told them to keep their ears and eyes open for activity. He also testified that he was ''interested in who was obtaining or signing cards.'' He further stated that he informed the home office of the ''numbers'' of people engaged in union activity, but ''not so much names,'' numbers being more important so that the emergence of a union card majority could be detected. Roland did not explain how the difficult task of keeping track of the normally secret signing of cards was executed, or what would have been done had Respondent become cognizant of the existence of a majority of card signers. Subsequently, Roland testified that he ''never told the home office the names of particular employees who were union supporters,'' but did state that, somehow, on his frequent visits to the Club, Davis ''knew the people that were supporters or not.'' Davis almost certainly could gain this knowledge only from Respondent's management, and Roland finally admitted that he and Davis, ''at various times,'' ''would talk about which employees were Union

Continued

When Riley came to work on April 9, his next scheduled workday, he was told by Supervisor Jackson that he might be spoken to about not phoning in at the beginning of his shift. On April 10, as he was finishing his shift, Jackson took him to Roland's office and he was handed a termination notice, which referred to (1) Riley's March 27 discussion with Levin and (2) his late call-ins on April 6 and 7, and dismissed him ''for repeated failure to follow proper notification procedure.[35] When Riley reached into his pocket to produce doctor's excuses, Roland told him that he was not being discharged for missing the days in question, but rather ''for failing to call in the beginning of my shift.''

Discharging Riley for not calling in prior to his shift was inconsistent both with Respondent's practice and with the testimony given by Respondent's managers. As we have seen, there were many NC/NSs which were not even made the subject of any discipline. Moreover, management representatives testified that the fact of calling in at some time during an absence could make a considerable difference. Thus, as indicated earlier, Roland was asked what would be the status of an employee who was absent but who called in 6 hours after his shift began; he replied, ''It could still be handled as an unexcused absence'' as opposed to a NC/NS. He subsequently testified that a NC/NS could be excused altogether depending on the ''circumstances.'' Michael Clark, a bargaining unit ''nonfood'' supervisor and a seemingly reliable witness, testified that he has called in between 6 and 8 a.m. for his 4 a.m. shift and not been disciplined or reprimanded. Roland also testified that if an employee called in 4 hours after his shift began to say that he was taking his child to a doctor, and if he came in the next day with a medical certificate, ''That would be an *excused* absence.'' Assistant Operations Manager Wells testified that, depending on the situation, whether or not a late call-in would be regarded as a NC/NS would be a matter for ''management discretion.''

But the decision to discharge Riley was definitively made by Roland and Davis without even speaking to Riley, thereby effectively precluding the exercise of discretion. And, indeed, even when Riley attempted to show Roland medical notes, Roland rebuffed him, stressing the failures to call in before the shift rather than the absences. That Riley was staying in a household with no telephone and was caught up in the care of his young child might have persuaded a reasonable superior to handle the matter in a nonpunitive way. Obviously, by April 10, Riley's termination was a fait accompli.

Riley was obviously not indifferent to his employment. His March 21 NC/NS was due to a serious domestic crisis, of which Roland was well aware. The written guidelines state, as earlier noted, that ''external circumstances, such as, [*but not limited to*] weather, carpools, public transportation must be handled with discretion by local management.'' Roland testified that employees have been (or can be) given excused absences for emergency legal problems, court appearances, and family crises.

According to the termination notice, Riley was discharged for, basically, two incidents: one domestic crisis NC/NS on March 21, and 2 consecutive days of absence caused by his daughter's sickness in April when he did call in, but 6 hours late. Other employees who are marked on the call-in logs as NC/NS, or some variant thereof, did not even receive any discipline. According to my calculations, comparing the call-in logs to the collection of disciplinary notices for the period December 28, 1991, through May 22, of the 36 employees marked on the call-in logs as NC/NS,[36] only 5 (aside from Riley and Kelley) received any discipline for that offense. Even if some of them had a justifiable excuse for their absences, the offense of *not calling* should have warranted discipline, under the treatment accorded to Riley. Respondent offered no explanation at the hearing as to why these absences did not result in discipline.

In this context, it seems plain that Respondent leaped at the chance, 6 weeks before the representation election, to rid itself of a leading union supporter. I find that the discharge of Michael Riley on April 10 was violative of the Act, as measured by the principles enunciated in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), and I decline to conclude that, in the absence of his union activity, Respondent has demonstrated that Riley would have nonetheless been terminated.

B. *The Allegedly Unlawful Discharge of Anthony Kelley*

Anthony Kelley was hired by Respondent in September 1991 as a ticketer. He was involved in the union campaign, although not as heavily as Riley. Perhaps in March, he began to wear union shirts at work. In February and March, Respondent awarded him stars in four categories (S-Speed and Safety; T-Technical Ability; A-Assistance; and R-Reliability) under a program for recognizing outstanding employees. He received two wage increases during this period, and on March 23, was given a complimentary performance appraisal (signed, inter alia, by General Manager Roland) which placed him in the ''Very Good'' category. He was named ''Employee of the Month'' for March. Effective April 11, Kelley, at his request, was promoted to a meat wrapper position, which entailed an increase from $7.11 per hour to $8. Meat Manager Michael Blalock selected Kelley out of five applicants, despite his obvious prounion penchant. He was discharged on May 1 for ''repeated and excessive failure to report to work and/or notify proper authority.''

The record shows that on April 12, Kelley failed to report to his new job on time and did not call in either before or during the shift. A fellow worker called Kelley at home an hour after the shift started and was told (and evidently in-

supporters.'' Still later, Roland said that from time to time, Davis would ask for names of supporters—this time, the reason given by Roland was, not to keep count, but to identify the individuals Davis ''may have wanted to talk to.'' Obviously, as Roland also agreed, Davis knew that Riley (and Kelley) were union partisans. As counsel for Respondent stated at the hearing, ''There's no question that the Employer had knowledge of the Union activities of the two discriminatees.''

[35] At the hearing, Roland again stated that Riley was discharged for ''failure to call in at the beginning of [his] shift.'' Since the termination notice refers only to Riley's ''reported failure to follow proper notification procedure,'' Respondent's argument on brief under the heading ''Riley's point-total exceeded the number required for termination'' is irrelevant.

[36] I include here some employees designated as ''no show,'' since, undoubtedly, if the employee had called in, that fact would have been entered.

formed management) that Kelley had overslept and could not come to work because of a babysitter problem.[37]

As far as the record shows, after his employment began in September 1991, Kelley had had no prior absenteeism problem at all. His March 30 performance appraisal gives him a ''Very Good'' grade for attendance and states, ''Anthony follows work schedule and reports to work on time.'' In view of this history, one wonders why, on the ''Sick and Tardy Report'' for April 12, someone (apparently Replenishment Manager Robert Jackson) has written ''NC/NS see me!'' next to Kelley's name. No such instruction was given for NC/NS employees Linda Strawderman and Gerald McCarthy on the same page.

On April 18, Kelley testified, he was ill and told his girlfriend to call in for him. She failed to do so. When he next went to work, no one mentioned this to him. But he evidently spoke of it to someone, because the record shows that he was paid accumulated sick leave for the day. Roland testified that in order to collect for sick leave, Kelley would have had to ask for it. Kelley received no discipline for either April 12 or 18.

On April 23, Kelley's girlfriend (as the record documents) was admitted to a hospital for an emergency, and was authorized by her health insurance administrator to be there for 4 days. On April 24, Kelley called Respondent before his shift was to begin and told Assistant Manager Levin about the situation, mentioned a babysitter problem, and assertedly told Levin that he would be out ''for a couple of days.'' Levin testified that he did not ''recall'' that Kelley said he would be out for more than 1 day. Levin made an entry in the sick and tardy report reading ''called 6:00 girl friend sick.'' Kelley stayed out the following day without calling in.

According to Kelley, he received a call from a fellow worker on April 25 informing him that he had been discharged. He says that he placed a call to the store prior to the beginning of his shift on April 26[38] and spoke with Meat Department Manager Blalock. Kelley testified that he told Blalock that he understood he had been discharged. Blalock assertedly began reminding Kelley of an earlier meeting in which Blalock had talked about the meat department personnel being a ''team,'' unlike the other store employees, and spoke of the need for Kelley to be present. Kelley asked if Blalock had received the April 24 message about his girlfriend being ill, but Blalock persisted in speaking about the ''team'' concept. Finally, according to Kelley, he asked if he was fired, and Blalock answered, ''Yeah. I don't need you. I told you I need team members back here.''

Meat Manager Blalock was out for surgery for most of April. While he was gone, senior meatcutter Anthony Haskins, a rank-and-file employee, was in charge, but Blalock would call in daily. On April 12, the day after Kelley began to work in the meat department, Haskins told Blalock that Kelley had not shown up or called in. Blalock testified that he told Haskins to talk to Roland ''about issuing a corrective warning notice for the no show/no call.'' Haskins later told Blalock that he had spoken to Kelley about the importance of calling if he was going to be absent.

Again, on April 18, Haskins told Blalock that Kelley was NC/NS. Again Blalock ''told [Haskins] to make sure that he got with Dave Roland, that a corrective had to be issued.'' On neither occasion, however, Blalock said initially, did he followup to see if Haskins had obeyed this instruction.[39] But Blalock testified that he spoke to Roland on April 22 to see if a corrective was being done on Kelley, and Roland said that he was in touch with Tom Davis at the national office ''making sure that all the correctives were being done correctly.''

On Monday, April 20, Haskins reported to Blalock that Kelley had called out sick that day. On April 22, Blalock visited the store for the first time since his operation and, with Haskins, spoke to Kelley about his attendance problems and the extreme hardship his absences imposed on his fellow meat department employees. Blalock first said that Kelley offered no explanation for the 2 NS/NC days. Later, however, Blalock said Kelley ''may have told me why he didn't call or show up on the 18th.'' At some point on April 22, Blalock spoke to Roland about Kelley's absence problems, in the manner indicated above.

Kelley generally confirmed that such an April 22 conversation had occurred. At the time, Kelley was wearing, as he had been since he started in the meat department, a union cap. He was evidently wearing it backwards. Blalock assertedly made some reference to the front office employees having failed to order official BJ's hats, and launched into a discussion of how the union cap was ''a joke'' and that the Union had never done anything for him or Haskins when they had worked in organized stores. After more discussion about why Kelley favored a Union, Blalock handed him a Michigan Wolverine cap that he had on his desk and told him to wear it instead of the union cap.

Blalock and Haskins both denied that there was any element of involuntariness in having Kelley wear the Wolverine cap. Blalock testified that he told Kelley to wear his cap with the brim facing forward, and he had Kelley saying that the only reason he was wearing the union cap was because he had not brought another cap. According to Blalock, he ''said I really don't care what hat you wear. You can even wear this Wolverine hat if you want.'' Haskins recalled that Blalock had a college hat and said to Kelley ''if you want to wear this, that's fine. Whatever. Just turn your hat around so that it looks professional.'' The versions given by Blalock and Haskins are less than cogent. If Blalock had only been interested in having Kelley wear the cap with the brim facing forward, he simply would have told him to turn the union cap around. Implicit in Blalock's bringing out the Wolverine cap is the notion that he did not want Kelley to wear the union cap; the gesture makes no sense otherwise.[40]

Blalock testified that on Friday, April 24, he received a report that Kelley had called to say he would be absent in order to ''take his girlfriend to the hospital.'' On Saturday,

[37] Kelley lived with his girlfriend and their small son. The girlfriend was also employed.

[38] Blalock testified that Kelley did not call until 5:30, a half-hour after his shift began, and Roland agreed, although he had no personal knowledge. Having no basis for choosing, I will assume that Kelley called in 30 minutes after the shift began.

[39] On cross, however, Blalock answered ''yes'' to a question about whether he had ''continually'' asked Haskins if he had talked to Roland about a corrective action for Kelley.

[40] At the hearing, the General Counsel stated that the cap episode was not alleged to be violative of Sec. 8(a)(1). The testimony, however, reflects on the veracity and animus of Blalock and Haskins, to the extent that those questions are implicated.

April 25, Kelley did not call in or show up and Haskins told Blalock by telephone that Kelley was NC/NS on that day. Again, Blalock instructed Haskins to ''talk to Dave Roland,'' but at first could not testify whether Haskins had done so or not. In subsequent testimony, however, Blalock said he believed that he asked Haskins on April 25 if he had talked to Roland, and Haskins said yes.

On Sunday, April 26, Blalock came to work to help Haskins take the monthly meat inventory. He had a conversation with Levin in which Levin told him that when Kelley called in on Friday, he had said that he ''needed to take his girlfriend to the hospital.'' Kelley, scheduled to report at 5 a.m. on April 26, telephoned around 5:30 a.m. According to Blalock, Kelley first said, ''I guess I am fired.'' When Blalock asked why he had not shown up that day and the preceding day, Kelley simply said that he had called in on Friday. Blalock kept asking about Kelley's absences, and eventually Kelley said ''never mind or oh well and hung up.'' Blalock denied having told Kelley that he was fired and also denied at first that Kelley had mentioned his message about his girlfriend in the hospital.[41] The next day, Blalock spoke to Roland, who said he was going to contact Davis and tell him about ''the situation.'' It should be noted that when *Haskins* recounted at the hearing the Blalock-Kelley telephone conversation as reported to him by Blalock, Haskins said that Kelley had asked, ''Well, do I still have a job?'' and Blalock had responded, ''What do you think?'' after which Kelley hung up.

Roland testified that he had received no information about Kelley's April 12 and 18 absences until he spoke to Blalock on April 22. Blalock, as indicated, testified that on both occasions, he told Haskins to talk to Roland about issuing a CI. Haskins testified that he thought he remembered speaking to someone about the absences, but could not remember who it was. Personnel Manager Singleton improbably testified that Haskins spoke to him about Kelley, and while Singleton could remarkably recall in June 1993 that it was ''on about the 18th of that month, the 18th to the 20th [of April 1992],'' he could remember only ''basically emotions, but not specifics.'' Singleton said that he ''would have'' directed Haskins to Roland. Haskins also said that if Blalock had told him to have Roland issue a CI, he ''would have done it.'' Given this testimony, together with Roland's denial that he knew anything about Kelley's April 12 and 18 absences until Blalock came in on April 22, I am reluctant to consider Blalock a reliable witness.

Blalock seemed to indicate (on brief, the General Counsel writes ''incredibly stated,'' but the testimony is not that clear) that he had never asked Haskins whether, as instructed, he had talked with Roland. But Haskins testified that Blalock had asked him if he had carried out Blalock's instructions ''four, five times, if not more.''

Roland testified that when he first heard from Blalock about Kelley's prior two NC/NSs on April 22, he told Blalock that he ''would call [Tom Davis] and see what steps we would take with Anthony from here on out.'' According to Roland, when he finally managed to speak to Davis on April 23 about the two NC/NSs, it was agreed that since the first NC/NS on April 12 ''had not been technically handled through management in giving the individual the warning with the probation,'' Kelley should be issued a written warning with probation which would ''couple the two [NC/NSs] together.'' Thereafter, while Kelley was listed on the call-in sheet as a NC/NS for April 25, the second day of his girlfriend's hospital stay, discussions with the home office presumably continued. When, on the morning of April 26, Kelley called in to verify that, as he allegedly heard, he had been discharged, Blalock reported to Roland that he had had an inconclusive call from Kelley, and Roland apparently received directions from Natick.

The problem with Roland's testimony that he first learned of the two NC/NSs from Blalock on April 22 is that *Blalock* testified that prior to April 22, he spoke with Roland, asked if a corrective was being done on Kelley, and Roland replied that ''*he was in touch with Tom Davis about making sure that all of the correctives were done correctly*.'' This testimony obviously contradicts that given by Roland and puts the credibility of both witnesses in question.

Roland testified that when he came to work on April 24, he was immediately (as he ''put [his] briefcase down'') informed by someone (whose identity he could not recall) that Kelley had called off. There was no explanation of why, since, on this occasion, Kelley had complied with the rules, someone should think it important to notify the general manager of Kelley's call-in. On Saturday, April 25, the second day of Kelley's girlfriend's hospitalization, Roland was told (he believes by Steve Wegleitner) that Kelley was not present and had not called in. Evidently there was no way for Roland to get in touch with Davis at headquarters in Natick on Saturday and Sunday for further instructions.

On Monday, April 27, Blalock called Roland to say that he had received a ''very bizarre'' call from Kelley on April 26 in which, among other things, Kelley had spoken of a rumor that he had been discharged. Blalock told Roland that Kelley would say little else about his absences. Roland then spoke to Davis and brought him up to date. Roland allegedly said that he was not sure whether Kelley was abandoning the job, and Davis suggested that he write to Kelley to set up a meeting.

On April 27, Roland wrote to Kelley, stating that since his appointment to the meat department, Kelley had run up a record of three NS/NCs, had ''called past your shift on 1 occasion, and has had the club notify you very late on another.[42] Roland asked Kelley to call him by April 30 to arrange a meeting, and that if he did not, Roland would assume that Kelley was no longer interested in being employed.

On April 29, Kelley called Roland. He apparently had not received the April 27 letter, and he asked Roland for copies of his employment records. Roland replied that Kelley should wait until he received the April 27 letter ''and maybe you'll want to change your course of action then.'' Kelley agreed, and when he received the letter, he made an appointment to see Roland, evidently on April 30 (see G.C. Exh. 17, subpar. C). In the meantime, according to Roland, he asked Blalock if he had told Kelley on April 26 that he was fired and

[41] On cross, however, Blalock quoted Kelley as having said, ''I had to take my girlfriend to the hospital on Friday.''

[42] The last reference is to the April 12 absence, which Roland agreed is also mistakenly included in the three NS/NCs. In his May 1 letter, infra, however, Roland counted the April 12 absence as a NS/NC.

''Mike claimed to me that [he] hadn't.'' Since Roland and Blalock denied that Blalock was authorized to discharge an employee, it seems peculiar that Roland would put such a question to Blalock.

At the April 30 meeting, Kelley tried to explain his record to Roland. Roland testified that Kelley said, inter alia, that he ''must have forgot'' to tell Levin on April 24 that he would be out for more than 1 day. On brief, Respondent contends that Roland's testimony was uncontradicted. Logically, however, Kelley's testimony that he told Levin that he ''would be out for a couple of days'' constitutes a contradiction of Roland's testimony. Roland finally said that he would consider the matter.

Roland then spoke to Davis again, described Kelley's history since April 12 and Kelley's explanations and excuses, and recommended that Kelley be discharged, testifying, inter alia, ''I told Tom I realized that I had had an opportunity to talk to Anthony prior in regards to what had transpired before this weekend, but that I don't see taking any probationary steps or written steps that is going to correct the situation. [F]elt that his termination would be upheld.'' Roland did not specify at the hearing the forum that might ''uphold'' the termination. Davis agreed to the proposed personnel action.

When Kelley called to get the decision, Roland said that he would have to be terminated. By letter dated May 1, Roland wrote to Kelley as follows:

> Anthony,
>
> I find it unfortunate but necessary at this time to formally document the following situations:
>
> a. On Sunday April 12, you failed to report to work at your scheduled shift. You also failed to properly notify management before your shift of your inability to report. Your failure to do so constitutes a ''No Call/No Show'' situation, which you are aware is a violation of company policy. Only after a call by a concerned fellow worker, approximately an hour after the start of your shift did we know of your whereabouts. Your reason for not calling was you overslept and the reason you were unable to come to work was due to a sitter problem.
>
> b. On Saturday, April 18 and Saturday April 25, you failed on both occassions [sic] to report to work on your scheduled shifts and failed to notify management, two additional ''No Call/No Show'' situations, totaling three in the last eleven working days. Based on our conversation of April 30, your reason for April 18 was your girl friend failed to call. The reason for April 25 was your failure to inform Ron Levin on Friday, April 24, when you called in to be excused for Friday, that you might need to be excused Saturday, April 25.
>
> c. On Sunday April 26, you again failed to report to work at your scheduled shifts. You called approximately thirty minutes after your shift and talked with your immediate supervisor/manager. Based on our conversation on April 30, your reason for not reporting was based on a ''rumor'' that you were already dismissed for employment.
>
> From April 11 to April 26, which consisted of twelve scheduled shifts, you called in ill on one occassion, called off for personal reasons on one occassion,[43] failed to report to work because of a ''rumor'' on one occassion, and had three ''No Call/No Shows'' during this period. Your apparent excuses for these ''No Call/No Shows'' are lame in substance and show lack of responsibility. Your failure to properly follow company policy cannot and will not be tolerated.
>
> Effective as of May 1, 1992, you are being dismissed for repeated and excessive failure to report to work and/or notify proper authority.

Although this case has an unusual twist, I am persuaded that the General Counsel has established that the discharge of Kelley was discriminatorily motivated, in accordance with the requirements of *Wright Line*, supra.

1. There is, first of all, the general impression that Respondent's witnesses, as pointed out at various junctures above, were not telling the truth. That is not to say that I found Kelley's testimony to be impeccable; on cross-examination, he did not do well. What we are interested in primarily here, however, is whether Respondent's witnesses are telling the truth about the reason for Kelley's discharge, and whether Kelley lied or not about the two major conflicts in the case (did he tell Ron Levin on April 24 that his girlfriend's hospitalization would keep him out of work for more than 1 day, and did Blalock tell him on April 26 that he was fired) seems essentially irrelevant. The aura of fabrication and confusion suffusing Respondent's testimony gives rise to a strong suspicion about its motivation.

2. Kelley's employment must be put in perspective. He was hired in September 1991 and not only stayed out of trouble until April 1992, but he was deemed a valuable employee. His March 30 evaluation rated him as a ''Very Good'' employee; he was awarded the four STAR emblems in honor of his achievements in various aspects of employment; he was named ''Employee of the Month'' for March; and, in March, he was promoted to the higher paying position of meat wrapper effective April 11. Kelley was clearly not a run-of-the-mill employee, and yet, for a relative handful of incidents in a 2-week period in April, he was discharged. This seems a decidedly strange decision for a rational employer to take, especially since, as discussed below, Kelley had never been given the sort of warning notice that Respondent admittedly thought appropriate, he was plainly making efforts, on April 24 and 26, to be in compliance with the rules, and the delicts on which Respondent relied were so limited in time and scope.

The honors heaped on Kelley by Respondent, of course, have their downside as far as the General Counsel is concerned: if Respondent was so disinclined to have a union, would it not have refrained from depicting an active union adherent like Kelley as an indispensable employee? This is the unusual twist earlier referred to, and I can think of at least two possible explanations, although I am unable to pinpoint one of them. It is difficult to know from this record just how active on behalf of the Union Kelley was, and the extent to which his activity increased as the election approached. It is possible that the union shirt which he says he wore ''probably'' twice a week beginning in ''March, maybe'' did not actually begin until after he had already

[43] Respondent did not count these first two excused absences against Kelley.

been chosen employee of the month. Although there is contrary testimony by Haskins, Kelley said that he did not begin wearing a union cap until he went to work in the meat department.[44] He may not have engaged in handbilling until early April, or at least may have become more active then.

On the other hand, Respondent, recognizing Kelley's value as an employee, may have chosen a strategy of trying to wean him away from the Union by openly favoring him. Roland testified that Kelley sometimes came to him with questions about the Union and ''in some cases, I went to Anthony and just began discussion or talk with him, not of union activity or anything,'' but Roland would express his views of the activity ''if it came up.'' There is something markedly odd about the general manager of a large work force like this one taking the time to engage in such conversations with a ticketer and/or meatwrapper, and it may well have been that Roland was trying to win Kelley's loyalty. But when it became apparent that Kelley had not been dissuaded (e.g., he participated in handbilling outside the store on April 23), that tactic would have been abandoned.

3. Despite any arguable inferences in Respondent's favor which might be drawn from its exceptional treatment of Kelley early on, I find inexplicable (at least on legitimate grounds) its behavior toward him in April. First of all, as previously discussed, there were apparently many employees whose NC/NS experience had been far worse than Kelley's. Second, Respondent demonstrated inconsistency in its overall treatment of Kelley.

Thus, Roland testified that when he first heard on April 22 (which is evidently not true) of Kelley's April 12 NC/NS (he had ''overslept'' and had a ''sitter problem'') and April 18 NC/NS (his sinuses bothered him and his girlfriend failed to call in as he had asked her to do), Roland and Davis assertedly decided not to discharge him because he had not had the benefit of a formal warning.[45] But when Kelley was finally discharged on May 1, he *still* had not received a formal warning.

It is true that Kelley did not report for duty for several days so as to be able to receive such a warning, but a combination of circumstances should have showed Roland and Davis that Kelley's heart was in the right place. He *was* at work on April 22 when Blalock spoke to him, and when, had he wished to do so, Blalock could have issued a corrective notice, according to Roland. He did not come to the store on April 23 because he was not scheduled to work. On April 24, he attempted to comply with the rules by calling in at 6 a.m. to say that his girlfriend was in the hospital.[46] On April 25, Kelley did not call in because, he says, he had told Levin the day before that he ''would be out for a couple of days.'' This may or may not be true. But when, on April 25, Wegleitner entered a NC/NS for Kelley on the call-in list, he evidently made no attempt to check with Levin about the circumstances of Kelley's call the previous day, although Levin's April 24 entry was only nine spaces above Wegleitner's April 25 entry. Had Wegleitner known of the surgery, he might not, in ordinary circumstances, have been so quick to enter the NC/NS.

Whether Kelley actually told Levin that he would be out for a ''couple of days'' is, however, not necessarily relevant. Levin did not write that down, even if Kelley did tell him, and the question is what did Roland know about the April 25 absence.

What strikes me as the important point here is that on April 24, Kelley not only acted in accordance with the rules, thus evidencing a desire to comply with the system, but also gave an explanation for the absence which would reasonably have suggested to Roland the cause of Kelley's failure to appear on April 25. Thus, although Levin only wrote ''girlfriend sick '' on the call-in log for April 24, Levin testified that Kelley told him that ''his girlfriend *was sick and needed surgery* and he couldn't be in for the day.'' Blalock testified that on April 26, he asked Levin what Kelley had said on April 24, and was told by Levin that Kelley said ''he needed to take his girlfriend *to the hospital*.'' Blalock further testified that on April 26, he reported to Roland his ''conversation with Ron Levin.'' But Roland testified that when Blalock spoke to him, he stated that he had ''talked to Ron Levin and he said Ron said that it [the girlfriend's illness] was *only* for the 24th.'' If, in fact, Blalock did report to Roland his ''conversation with Ron Levin,'' Roland would have known that Kelley's girlfriend had to go ''to the hospital,'' and that it was very unlikely that Kelley would have said that it was ''only for the 24th.''

Again, on April 26, Kelley signified that he was trying to work within the system. He testified that he called in shortly after his shift began because a fellow employee had told him of a rumor that Kelley had been discharged; while he could not remember at the hearing the identity of the friend, he narrowed it down to two people. Respondent's brief attempts to question Kelley's inability to recall the identity of the fellow employee, but I fail to see what Kelley may have thought he had to gain by being vague on this subject.

On April 26, Kelley was due to report at 5 a.m. Blalock came in for work that day. Kelley called at 5:30 a.m. and, according to Blalock, said, ''I guess I am fired.'' Neither Kelley nor Blalock has Blalock answering this question. There followed a series of questions by Blalock about where Kelley had been on the previous day, and, says Blalock, the conversation ended with Blalock asking and Kelley saying, ''Why aren't you here today and he said never mind or oh well and hung up.'' Kelley proffered a different version of the conversation, the most critical difference being that Kelley finally asked, ''Does this mean, you know, does this mean I am fired or what?,'' and Blalock purportedly replied, ''Yeah, I don't need you. I told you I need team members back here.'' Accordingly, Kelley did not come to work on April 26.

There are reasons for believing Kelley's testimony that Blalock told him he was through. One is Haskins' testimony that when Blalock told him about the call from Kelley, Blalock reported that Kelley had asked, ''Well, do I still have a job?,'' and Blalock had replied, ''What do you think?'' This is a far cry from Blalock's ''[H]e said never mind or oh well and hung up.'' ''What do you think'' very strongly conveys the notion that Kelley was indeed fired, and

[44] I am inclined to credit Haskins on this point, although neither witness commanded much respect for his trustworthiness.

[45] Blalock had admonished Kelley for not calling in, but that was not considered sufficient notice.

[46] Levin, who took the call, testified that Kelley said that ''his girlfriend was sick and needed surgery,'' and he assumed that she was in the hospital. All he wrote on the call-in sheet, however, was ''called 6:00 girl friend sick.'' Respondent states that this absence was not a factor in Kelley's discharge.

is corroborated by Blalock's failure to instruct Kelley to come to work *instanter*. Another reason is that Kelley called Roland on April 29 to ask for copies of his personnel records, a request which obviously suggests that Kelley understood that he had been discharged.

The critical question, however, is what Roland (who found out about it when he came to work on April 27) knew about Kelley's failure to come to work on April 26. Blalock testified that from his home, he called Roland on Monday, April 27, to say that he had received a strange phone call from Kelley on the day before and Kelley had not shown up the rest of that day, nor had he, according to an April 27 phone conversation with Haskins, come to work on April 27. Roland told Blalock that he was still ''in the process of doing corrective action.'' He also told Blalock to make notes of the April 26 conversation with Kelley. Blalock did so, ''shortly after the incident on the 26th.'' Plainly, Roland believed it to be necessary to document the Kelley case.

Having been told that Kelley had called at 5:30 a.m. on April 26 and had asked if he had been fired, Roland must have recognized that Kelley still desired to retain his job, and he surely must have considered it peculiar that Kelley, having made the effort to call, had not come to work. There does not appear to have been, however, any reason for Roland to assume that Kelley had not come to work because he believed he had been discharged by Blalock. It would have seemed perplexing, I should think, and that was the image that Roland projected when he wrote to Kelley on April 27, offering an opportunity to discuss his recent attendance record which, if not taken up, would signify his desire no longer to work for Respondent.

After they met on April 30, Roland wrote a letter on May 1, outlining the reasoning which led him to discharge Kelley ''for repeated and excessive failure to report to work and/or notify proper authority.'' While Roland listed separately three NC/NSs on April 12, 18, and 25, and the failure to report after calling in at 5:30 a.m. on April 26, Roland then padded the record by referring in a summary to Kelley's two *excused* absences for illness and personal reasons.

Although Roland had, he stated, felt constrained on April 22 not to discharge Kelley because Kelley had received no formal warning and placement on probation for his first NC/NS on April 12, he was not reluctant to fire him on May 1 even though Kelley had still not received such a warning (which could have been mailed to Kelley from April 22 on or handed to him on April 30). Assistant Operations Manager Wells testified very firmly that if a ''person had four occurrences and they had not had any progressive discipline up to that point, they would just be getting a verbal''; Respondent would ''absolutely not'' cumulate undisciplined occurrences and penalize an employee for all of them at once, which would ''of course'' be ''unfair.'' In addition, Roland said, in speaking of *Riley's* second warning, ''You don't add the numbers together and go to the point in time. *You look at the steps that were already taken with the individual*.'' But he later stated, illogically, that this rule did not apply to Kelley because of the ''severity of the number of no call/no shows that he had accumulated in that time frame.'' That approach, however, is squarely inconsistent with the NC/NS rules, which expressly require that before an employee is discharged for a second NC/NS, ''he/she will be placed on probation immediately and will be given a written warning.''

Kelley's girlfriend's emergency hospitalization on April 24 certainly made clear to Roland a plausible reason for Kelley's failure to call in on April 25, and his April 26 early morning call-in plainly communicated to Roland Kelley's desire to remain in Respondent's employ. Roland agreed that it would not be ''unreasonable'' to give Kelley the benefit of the doubt as to whether he had said to Levin that he would be out for a couple of days. But in disregard of Kelley's previously unblemished and obviously valuable service, in circumstances, as set out above, which were most suspicious, over a 2-week period involving a few easily forgivable incidents,[47] Respondent found—3 weeks prior to the election—Kelley's attendance record to be intolerable, in an environment in which absence from work was, it seems clear, often treated with indifference.

Blalock at first told us that there had never been a meat department employee with an attendance problem ''that I can recall,'' other than ''a couple of instances where a guy was five or ten minutes late.'' On further cross-examination, however, Blalock agreed that he had disciplined a meat clerk named Paul who had an ''attendance problem with no call/no shows also.'' Paul, however, had a drug problem as well, and Respondent ''helped him get drug rehabilitation,'' after which he returned to work. As earlier discussed, Roland also testified that employees could be excused, even for NC/NSs, depending on the ''circumstances.'' But in the case of Kelley, who was said by Roland to be a ''very good employee,'' Respondent brushed aside his outstanding work record, his obvious desire to remain employed in the higher paying position to which he had just been promoted, and, on the strength of four (arguably excusable and, contrary to Respondent's stated policy, previously undisciplined) absences over a 2-week period, Respondent showed him no mercy similar to that accorded the meat clerk with the drug problem.[48]

On the foregoing facts, it is difficult to escape the conclusion that Respondent took advantage of Kelley's not uncommon patch of absences to discriminate against him because of his union partisanship. The departure of both Kelley and Riley in a 3-week period of time in April must certainly have seemed to Respondent to be an impressive display of power in preparation for the May 22 representation election. I conclude that the discharge of Anthony Kelley on May 1 violated Section 8(a)(3) and (1) of the Act.[49]

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[47] Blalock spoke of the desperate need for Kelley's services. But the record shows that the departing meatwrapper had agreed to stay around to train Kelley, which was presumably done on the occasions during this period on which Kelley reported to work.

[48] On brief, Respondent contends that, aside from two excused absences in April, Kelley ''failed to report for his scheduled shift'' on five occasions. Subsequent argument shows that Respondent is referring to April 12, 18, 25, 26, and 27. The April 27 letter, however, does not refer to the latter occasion. It seems strange that Roland failed to include the April 27 NC/NS, and is perhaps only explicable by an assumption that, in Roland's mind, Kelley was already history.

[49] I have examined *Fruehauf Corp.*, 225 NLRB 906 (1976), and *Swingline Co.*, 256 NLRB 704 (1981), cited by the Respondent as analogous to the Kelley situation. I find both cases to be factually inapposite.

IV. CASE 5–RC–13708

A representation election was held on May 22. The tally of ballots showed that of approximately 152 eligible voters, 68 cast ballots for the Union, 67 opposed the Union, and 12 ballots were challenged. The Employer filed five objections to the election.

In his August 13 report on objections and challenges, the Regional Director noted that the parties had agreed that 9 of the 12 challenged ballots were cast by ineligible voters. Two of the remaining three challenges related to ballots cast by Michael Riley and Anthony Kelley. The Regional Director, recognizing that their eligibility would rest on the outcome of the unfair labor practice proceeding in which the two were named as discriminatees, ordered that the question of the validity of their ballots be consolidated with the complaint case. The third challenge, cast by the Union, was also consolidated for hearing, but was later withdrawn by the Union at the hearing. Of the five employer objections, the Regional Director recommended that two of them be overruled, and that the other three be consolidated with the unfair labor practice hearing for resolution.

A. Objection 1 reads as follows:

> The Employer objects to the Petitioner's conduct, during the critical period prior to the election, of Petitioner's agents, representatives, attorneys and adherents, allegedly threatening to use Petitioner's influence, power and long term collective bargaining relationship with another employer to have one or more of the Employer's employees discharged from a position of employment held by the employee with that other employer, who has an ongoing collective bargaining relationship with the Petitioner, unless the employee voted in favor of representation by the Petitioner in the upcoming election or resigned his employment with the Employer.

Before discussing the merits of this objection, there is an unusual procedural history which should be addressed. On June 9, a BJ's employee named Aaron Fletcher filed a charge accusing the Union of violating Section 8(b)(1)(A) and (2). On July 23, the Region issued a complaint containing the following material allegations: that Fletcher also worked for Giant Food, Inc.; that Giant Food maintained a policy prohibiting its employees from working for competitor grocery stores; that the Union ''informed [Giant Food] that its employee [Fletcher] was also employed by BJ's, a competitor of Giant,'' in order to force Fletcher to choose between continuing his employment with BJ's and Giant Food because the Union believed that Fletcher was going to vote against the Union in the BJ's election; and that on or about May 22, at BJ's Woodbridge location, the Union's agent Michael Riley violated Section 8(b)(1)(A) by ''telling employees that Respondent would not have informed [Giant Food] of [Fletcher's] employment with BJ's had [Fletcher] not expressed his intention to vote against representation by [the Union] in the election.''

In considering Objection 1 in his report, the Regional Director stated, in part:

> The allegations raised in Objection 1 parallel violations of Section 8(b)(1)(A) and (2) alleged in an unfair labor practice charge in Case 5–CB–7217, filed by Aaron Fletcher on June 9. Specifically, that unfair labor practice charge alleged that Petitioner restrained and coerced the employees of Giant Food, Inc., by causing or attempting to cause Giant Food, Inc. to discipline, discharge or take adverse action against Fletcher because he chose not to assist, join or support the Petitioner during Petitioner's organizing campaign among the Employer's employees. In support of Objection 1, the Employer submitted an affidavit from Fletcher.
>
> On July 23, an [sic] Complaint and Notice of Hearing issued in Case 5–CB–7217, alleging that Petitioner threatened to interfere with Fletcher's employment with Giant Food, Inc. and attempted to cause Giant Food, Inc. to take adverse action against Fletcher because he failed to support Petitioner's organizing campaign among the Employer's employees.

The report went on to say that Objection 1 ''is substantially the same as the allegations in the Complaint and Notice of Hearing in Case 5–CB–7217,'' and it recommended that the Objection 1 allegations be consolidated with Cases 5–CB–7217 and 5–CA–22706 for hearing.

As I indicated at the hearing, Objection 1 was not ''substantially the same '' as the allegations in the Case 5–CB–7217 complaint. Shorn of the excess verbiage, Objection 1 alleges only that during the critical period, the Union's agents had *threatened* to use its influence to have one or more of BJ's employees discharged from another job unless the employee voted in favor of the Union or resigned his job with BJ's. The complaint allegations, on the other hand, are more extensive: that the Union had in fact informed Giant of the dual employment with the hope of coercing Fletcher to quit his job with BJ's; and that a union agent had told BJ's employees that the Union would not have informed Giant Food of the dual employment if Fletcher had not expressed his intention to vote against the Union.

Case 5–CB–7217 was settled by informal agreement between the Respondent-Union and the General Counsel during the course of the trial. The extent to which the Fletcher matter needed inquiry at that point became a practical issue. If, as it could be contended, the Region was submitting to me only the conduct described by the literal terms of the objection, then the other matter alluded to by the settled complaint would not need investigation. With my encouragement, counsel for the Employer wrote to the Regional Director for a clarification of precisely what had been referred to me for hearing, arguing, inter alia, that the Employer's Objection 1 was sufficient to encompass the conduct alleged in Case 5–CB–7217.

In a prompt response, the Regional Director replied that his report ''is clear on its face and speaks for itself. . . . What remains for the judge to decide in Case 5–RC–13708 are the election objections identified in the Report, specifically Objections 1, 4, and 5.'' This language, as further amplified at the hearing by the counsel for the Region especially appointed for the representation case hearing, leaves no doubt that the Regional Director intended for me to hear and decide only the issue explicitly stated in the objection.

As the Respondent points out on brief, the Regional Director is empowered, and perhaps obligated, to expand on objections discovered during the course of his investigation and,

despite his initial mistaken belief that the allegations in the objection and those in Case 5–CB–7217 were substantially identical, he could have referred to me as additional objectionable material the other related matter set out in the complaint. Why he chose not to do so, I do not know, although I assume that he had some good reason for so refraining.

The cases cited by Respondent, while not entirely congruent, seem unmistakably to stand for the proposition that the Regional Director may—or should—investigate matters potentially affecting the election, even though they are not specifically alleged in the objections. *American Safety Equipment Corp*., 234 NLRB 501 (1978); *White Plains Lincoln Mercury*, 288 NLRB 1133 (1988). In *American Safety Equipment*, supra at 501, the Board stated:

> In the exercise of the [Regional Director's] discretion, he may confine the investigation to matters specifically complained of in the objections *or intimately connected thereto*. On the other hand, he may view the filed objections as having cast suspicion over the entire election process, thereby justifying his independent investigation of matters not specifically contained in the objections. However, no matter which approach the Regional Director chooses, if he receives or discovers evidence during his investigation that shows that the election has been tainted, he *has no discretion* to ignore such evidence and it is reversible error if he fails to set aside the election. [Emphasis added.]

In *White Plains Lincoln Mercury*, supra at 1137, the Board took a different tack:

> [T]he scope of the investigation may take one of two courses. The Regional Director may confine his investigation solely to those matters that are *specifically* set forth in the objections, or he may broaden the investigation to include areas not mentioned in the objections. Either course is permitted, and which course is followed is within the *sole discretion* of the Regional Director. [Emphasis added.]

While there seems to me to be conflict here, the remainder of *White Plains Mercury*, focusing on the need of the administrative law judge to consider ''all evidence revealed during the course of the inquiry'' (id. at 1139) in assessing the fairness of the election, leads me to conclude that I was probably obliged to consider in the representation case the original complaint allegations in the 8(b)(1)(A) case.

This might present somewhat of a problem in this case, since I ruled that the Regional Director was limiting my authority to the specific objection filed. Presumably on the strength of this ruling, the Union chose not to litigate the question of whether Fletcher was discharged by Giant at the Union's behest. Furthermore, when the Regional representative presented evidence through a Giant assistant director of labor relations that the Union's service director had informed Giant that Fletcher was acting in violation of Giant's two-job rule, the evidence came in only for the possible purpose of impeaching certain union witnesses.

In any event, I would not find the Union's conduct itself to be objectionable. Putting pressure on Giant in order to make Fletcher, probably considered by the Union to be a ''no'' vote at BJ's, opt to work solely for Giant, would not itself reasonably have affected any votes. Fletcher was suspended by Giant prior to the election, was clearly angered about the loss of the Giant employment, obviously blamed the Union for having forced the choice, and can hardly be thought to have thereafter been converted from a ''no'' vote to a ''yes'' vote in a secret-ballot election.

There is, however, a potential argument based on possible dissemination of such union conduct to other employees. The evidence shows that employee Fletcher was told by Giant managerial personnel that he had violated the rule against Giant employees working at the same time for Giant's competitors, and that if he did not resign his job at BJ's, he would have to quit Giant. Fletcher left his employment at Giant.[50] On election day, May 22, as a number of employee organizers, including Kenneth McLaughlin, were handbilling at the entrance to BJ's, Fletcher motioned McLaughlin to speak with him, and he told McLaughlin in the breakroom that the Union had caused him to lose his job at Giant.[51] McLaughlin said that while other employees were present in the breakroom, McLaughlin thought ''they really couldn't comprehend the entire conversation.''

Upset by Fletcher's complaint, McLaughlin went outside and asked Michael Riley, who was engaged in the handbilling, about the matter. According to McLaughlin, Riley said that he ''thought'' that if the Union had not known that Fletcher was a ''no vote,'' no one ''would have said anything.'' McLaughlin testified that there were a number of handbillers in the vicinity who ''could have heard, but I don't think anyone was listening.'' Later, McLaughlin said, Riley told him that Giant gave Fletcher the option of ''staying at Giant or quitting BJ's.''

Riley testified that his response to Fletcher's complaint about the Union costing him a $30,000 job at Giant was, ''If anybody cost [Fletcher] a job, he cost him the $30,000 a year job.'' Riley testified that what he meant by this was that Fletcher knew about Giant's policy and took a foolish chance.

Riley initially made an excellent appearance as a witness, but did not acquit himself well on cross-examination in the representation portion of the proceeding. His testimony that he knew nothing on May 22 about the possibility of Fletcher being discharged by Giant is belied by his own testimony, which indicates knowledge of (1) the Giant rule and (2) the likely application of the rule to Fletcher. Although he was not a perfect witness, I was impressed by McLaughlin, who was called to testify by both the General Counsel and the Employer. I therefore credit McLaughlin over Riley.

Objection 1 is addressed to the Union's alleged ''threat'' to use its influence and bargaining relationship with Giant to have Fletcher discharged unless Fletcher ''voted in favor of representation by the Petitioner in the upcoming election or resigned his employment with'' BJ's. Literally, none of this was proved: there was no showing of any ''threat'' by the

[50] He did not do so by choice, however. The record shows that while Giant originally gave Fletcher 2 weeks to make up his mind, he lied to Giant about having car trouble on May 22 so that he could vote in the BJ's election. On May 23, he was suspended by Giant, and some brief time later he was terminated.

[51] As shown in the preceding footnote, however, Fletcher had not at this time lost his Giant employment; he was still in the 2-week period Giant had originally given him to choose between the two stores.

Union to so exercise its influence. Nonetheless, on the basis of the precedents previously cited, it appears that I should consider the statement made by Riley.

The question arises as to whether Riley should be deemed to be an ''agent'' of the Union for purposes of attributing his statement to the Union. The record shows that Riley and another employee made the initial contact with the Union, and Riley was selected as co-chair of the organizing committee which was created at the first meeting (and fluctuated in composition thereafter). Members of the organizing committee, according to James L. Hepner, business representative of Local 400, were ''Local 400's primary contact people at BJ's.'' Hepner, however, also identified six other business representatives of the Union as having participated in the campaign, as well as Mike Christy, director of organizing for Local 400, and Riley testified that if employees asked him questions, he referred them to the business representatives, who maintained headquarters in a nearby Day's Inn motel room.[52] Riley also would notify other organizing committee members of meetings called by Hepner. The organizing committee met weekly with a Local 400 representative present, and the union representative would give them leaflets to pass out. In addition, Riley engaged in the normal activities of an active union supporter—soliciting signatures on authorization cards, making home visits to undecided voters, and handbilling.[53]

The Board has held persistently that membership in a formally established organizing committee does not automatically demonstrate agency or apparent agency. *Owens-Corning Fiberglass Corp*., 179 NLRB 219, 223 (1969); *Tennessee Plastics*, 215 NLRB 315, 319 (1974); *Mike Yurosek & Sons*, 225 NLRB 148, 149–150 (1976); *Service America Corp*., 298 NLRB 736, 738 (1990). In *Davlan Engineering*, 262 NLRB 850 fn. 3 (1982), the Board panel majority also reaffirmed ''established Board precedent which holds that the solicitation of authorization cards by employees, standing alone, does not make those employees agents of the union.''[54] As the Charging Party points out, Riley's relationship to the Union was in major respects similar to that of the disputed organizing committee member in *Advance Products Corp*., 304 NLRB 436 (1991), even to the point of having professional representatives on the scene during the preelection campaign. See also *United Builders Supply Co*., 287 NLRB 1364 (1988) (Member Johansen dissenting), where an employee who made the initial contact with the union, received unsigned cards from the union and returned signed cards to it, arranged 18–25 meetings and personally invited virtually every employee to them, was asked by the union to arrange 3 or 4 meetings at which a union representative appeared, and engaged in other activities, was neither an actual nor apparent agent of the union.

Given the active presence of several professional business representatives who were assigned the task of answering employee questions relating to the union organizing effort, *Tennessee Plastics*, supra, it is difficult to say that any comments by Riley about the Union's role in bringing about the forced choice by Fletcher would have been viewed as attributable to the Union. McLaughlin testified, furthermore, that Riley did not make an authoritative statement, but only ventured an opinion: Riley said that he ''thought'' that nothing would have been said if the Union had not known that Fletcher was a ''no'' vote.[55]

Agency considerations aside, it seems wholly unlikely that such an expression of opinion, even if it were perceived to have a threatening aspect, could have affected the vote of McLaughlin, who, as a member of the organizing committee, had worked for the union cause for 4 months. Of course, if the comment turned McLaughlin against the Union (its most likely tendency) and he voted accordingly, Respondent would scarcely wish to protest this new ''no'' vote.

McLaughlin did not believe that anyone, either in the breakroom with Fletcher or in the handbilling area with Riley, overheard the subject being discussed (the whole occurrence took place just ''five or ten minutes before the election began,'' according to McLaughlin). McLaughlin also testified, however, that while he could ''assure'' us that Fletcher's termination was not common knowledge, he did speak to one other employee, Kendall Miller, about the same subject; this was presumably moments before the election. McLaughlin did not testify about what he told Miller. Fletcher was much less certain about whether he had disseminated the news of his (as yet undecided) termination to other employees prior to the election:

> Q. Before the election was held, did you talk to any other employee about what you thought the Union had done to you?
>
> A. I may have spoken to, you know—I mean, specifically I didn't—I may have spoken to some of the people I work with. I mean directly. Other meat cutters. I may have but it wasn't—I mean, it was more or less, you know, ''Guess what happened to me, guys.''
>
> Q. Exactly. So you may have spoken to—how many employees would you estimate?
>
> A. There's three or four of the guys that cut meat.

Fletcher does not say what it was that he ''may have'' said to the other meatcutters. His diffidence and uncertainty

[52] This procedure was followed, according to Hepner, pursuant to an announcement to the bargaining unit employees that if they had questions, they should seek out the organizing committee members ''and they will help get you assistance.

[53] Beginning on May 22, the Union made payments to Riley, who had not found a new job, and he performed some miscellaneous work for the Union. Unlike the Employer, I think this material is not relevant to the question of the effect Riley's statements might have had on the election.

[54] The Respondent's brief misleads in the citations made to undergird the claim that the Board ''has attributed the conduct of in-house committee members and union suporters to a union.'' In fact, in *L&J Equipment Co*., 278 NLRB 485 (1986), the Board, which had earlier found organizing committee members *not* to be agents, accepted as the ''law of the case'' the Third Circuit's reversal of the Board's conclusion. In *Bristol Textile Co*., 277 NLRB 1637 (1986), unlike here, the employee in question was the union's only link with the employees. In *Bio-Medical of Puerto Rico*, 269 NLRB 827 (1984), the union held out the employees in such a way as to confer apparent authority.

[55] Subsequently, McLaughlin gave testimony which would indicate that Riley possessed actual knowledge of the event. McLaughlin said that ''later on,'' after he spoke to Fletcher, Riley told him that ''they did give Aaron the option of staying at Giant or quitting BJ's.'' There is no showing whether ''later on'' was before or after the election.

suggest that, if he did speak to them, it was not a full explanation of the events.

In any event, even on the assumption that McLaughlin spoke to Kendall Miller and Fletcher to other meatcutters prior to the election about the Union's conduct, it seems most unlikely to me that such communications would have affected the election in a fashion adverse to the Employer.[56] Employees who might be angered by the Union's action would, human nature dictates, step into the voting booth and cast their vote *against* the Union. I find it totally unrealistic to think that such employees would be moved to vote *for* the Union, out of fear of reprisal if they did not. Employees know that their ballots are secret, and that the Union is therefore not going to know how they voted.

Nonetheless, as Respondent points out, the Board has often held that a threat addressed to a perceived nonunion voter may prejudice the election. (I find no mention in these precedents of the obvious argument that the voter has the opportunity to opt for rejection of the Union in the voting booth, a choice of which the Union, except in the rarest of cases, would not be aware.) *Smithers Tire*, 308 NLRB 72 (1991); *Buedel Food Products Co.*, 300 NLRB 638 (1990); *Baja's Place*, 268 NLRB 868 (1984).

Having found that Riley was not acting as an agent of the Union in making his comment to a fellow member of the organizing committee, however, it seems appropriate to apply the Board's more demanding third-party standard to his conduct: whether it was ''so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible.'' *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984); *Diamond State Poultry Co.*, 107 NLRB 3, 6 (1953). As earlier discussed, the extent of dissemination of Riley's remark to McLaughlin was at best limited by him to one other employee, and the nature of Fletcher's comments to other meatcutters, like McLaughlin's conversation with Miller, was not made clear on the record. Riley's statement to McLaughlin in answer to a question by the latter was plainly not meant as a threat to anyone, and this whole subject area can hardly be characterized as ''so aggravated as to create a general atmosphere of fear and reprisal.''

Finally, it might be noted that even though the Board has found threats to be a basis for inferring prejudice to the election, it would seem that the best argument for reaching that conclusion is that a threat might influence an employee to refrain from actively supporting the Employer prior to the election, out of fear of suffering reprisals should the Union prevail. But where, as here, so little time elapsed between the ''threat'' and the election, this dynamic could not become operative.

On the basis of the foregoing discussion, I would dismiss Objection 1.

B. Objection 4 reads as follows:

> The Employer objects that, during the critical period prior to the election, the Petitioner, through its agents, representatives, attorneys and adherents, threatened that if the Petitioner was successful in the upcoming NLRB election, it would cause the termination of one or more of the Employer's employees by negotiating their positions out of existence unless the employees continued to support the Petitioner in its efforts to organize the Employer's employees.

Christina Lecher[57] testified that early in the campaign, she favored union representation and actively and openly supported the Union as a member of the organizing committee. There came a time, however, when her ardor diminished. Nonetheless, she continued to appear at the Union's headquarters at the Day's Inn, where she had struck up an acquaintance ship with Judy Gadikian, a Safeway employee on leave to assist with the campaign.[58]

Lecher testified that on one occasion, Gadikian said to her that since she was a ''fence rider,'' not fully committed to either side, she should not be on the committee, and if she did not vote yes, ''that all the company is doing is using you and you won't have a job after the election's over with, if we don't get in the store.'' Lecher was then led into adding that Gadikian also said, on more than one occasion, that if Lecher ''continued to ride the fence, that the Union could negotiate [her] job out of existence.'' Gadikian also allegedly said that ''being I [Lecher] was already known as a union supporter in the beginning, that if I—if the union didn't get in the company would fire me anyway for going against it.'' Lecher did not remember telling any other employee about the threat to ''negotiate [her] job out of existence.'' While, on cross, she stated that she did not ''recall'' being considered, or making the statement that she was being considered, for a supervisory position at BJ's (''It doesn't sound like something I would say''), she said on further examination that at some time prior to the election, Merchandise Manager Levin had told her that, before giving her a managerial promotion that she had put in for, he ''wanted to see me as a supervisor.''

Judy Gadikian, a Safeway shop steward and a vice president and executive board member of Local 400, took a leave of absence from work to help with the campaign at BJ's. She testified that Lecher came to the Day's Inn headquarters for lunch almost every day, and that the two women had engaged in a number of conversations.

According to Gadikian, about 2 weeks before the election, Lecher said to a group in the motel room that ''she was possibly going to be promoted, she was going to be a super-

[56] Respondent's brief states: ''Rielly's [sic] message was disseminated to other employees [,] [e]mployees like Christine Lecher who had already been told that if she did not support Local 400 her job would be negotiated out of existence.'' The objection relating to Lecher will be discussed, infra. It should be noted, however, that there is no evidence that Riley's message was disseminated to Lecher or ''employees like'' Lecher in the brief period between Riley's remark to McLaughlin and the election.

Nor is it true, as Respondent claims, that the record shows that ''in the week before the election, Union business agents discussed termination of a 'BJ's' meatcutter (Tr. 1797–1798 [sic; presumably should be 1757–1759]).'' The most that can be derived from Gadikian's testimony at the pages last indicated is that perhaps within a week of the election, she heard ''people'' in the Day's Inn motel room say that Fletcher was also employed by Giant.

[57] At the hearing, I asked Lecher how she spelled her name, and the transcript shows her saying ''L-E-T-C-H-E-R.'' Documents in evidence (E. Exhs. 1, 2, 3), however, establish that the ''T'' is incorrectly included.

[58] Although Lecher did not know it, Gadikian is a steward at Safeway, and vice president and member of the executive board of Local 400.

visor.'' After that, Lecher eventually stopped wearing her union apparel and then ceased coming to the motel. Gadikian assumed, from Lecher's statement as to possible supervisory status and her apparent loss of interest in promoting the Union, that she was no longer sympathetic to the cause. Gadikian saw her only once thereafter, when she went to Chrissy Johnson's house.[59] Gadikian quoted Lecher as asking, ''Aren't you all talking to me today? Don't you want me to be on the Union side?'' Gadikian ''basically'' replied, ''At this point in the game, you're either on one side or the other. There are no fence riders three days before the election.'' Gadikian denied saying anything about the Union negotiating Lecher's job out of existence or anything similarly threatening.

Counsel for Respondent put Gadikian through the hoops on cross-examination and, although the matters on which she became entangled were subsidiary issues, she nonetheless showed herself to be an unreliable witness. Lecher, however, was not more impressive, and in fact, purely on demeanor grounds, I thought that Gadikian had the better of it. Lecher could not decide whether Gadikian had threatened her personal ''job'' (testimony) or her ''position'' (affidavit). These are two quite different contentions; her ''position'' of ticketer was well populated, and it is hardly likely that the Union would be interested in negotiating that category into oblivion. On the other hand, it seems farfetched to think that the threat was that the Union would bargain away a single ticketer's position, that of Lecher. My impression of Gadikian, furthermore, despite her union offices, was that she was not nearly sophisticated, or malicious, enough to make a threat involving an elimination of Gadikian's job by ''negotiation.''

The credibility issue is not an easy one, but I am inclined to accept Gadikian's testimony. Even if I were to conclude that I could not choose between the two, I would have to recommend dismissal of the objection, since the burden in these cases is on the objecting party. *Bell Foundry Co. v. NLRB*, 827 F.2d 1340, 1343 (9th Cir. 1987).[60]

There is no evidence that Lecher told her story to any other employee, and I might add parenthetically that, after seeing her testifying, I have no doubt whatsoever that she voted against the Union in the May 22 election. In any event, I recommend that Objection 4 be overruled.

C. Objection 5 reads:

> The Employer objects that, during the critical period prior to the election, the Petitioner, through its agents, representatives, attorneys and adherents, threatened relatives of one or more of the Employer's employees, which relative(s) were employed by other employers which had collective bargaining relationships with the Petitioner, with loss of employment, loss of benefits and the loss of their positions within the Petitioner unless they were successful in coercing the Employer's employees from actively campaigning against the Petitioner, and threatened the Employer's employees that such reprisals would be taken against their relative(s) if the Employer's employees continued to refrain from supporting the Petitioner.

Former employee Donna Apperson testified that, while employed at BJ's during the election campaign, she attended union meetings at which she made derogatory remarks about the quality of the Union's representation at Shopper's Food Warehouse, another store at which she had been employed. Perhaps a month before the election, Apperson was told by her aunt, a shop steward at a nearby Safeway store organized by Local 400, that Ermaum Joe, a union representative, had told Steward Gadikian to tell the aunt to ask Apperson to ''keep [her] month shut and to stop bad-mouthing the Union.''

This is, of course, multiple hearsay and was duly objected to. I did not sustain the objection, however, in order to await developments on this issue. At hearing, counsel for the Employer represented that after obtaining the name and address of the aunt (Pauline Lowery) during Apperson's testimony, he had issued a subpoena to Lowery. She did not appear at the appointed time. Employer's counsel asked that the General Counsel undertake enforcement of the subpoena.

I noted, first, that while the Board's Rules and Regulations (Sec. 102.31) contain a provision for proceeding, in the ''judgment'' of the Board, with enforcement of subpoenas in unfair labor practice cases, the provisions of the Rules related to subpoenas in representation cases contain no similar language about enforcement of such subpoenas (Sec. 102.66). Second, I pointed out that Respondent had filed this election objection almost 14 months before; that in January, the case had been set for hearing in May, and Respondent had made no visible effort to obtain the name of the aunt until Apperson testified on July 1, not even asking counsel for the Union to seek out the information as a courtesy; nor had Employer's counsel attempted to contact Lowery by telephone to impress on her the potential consequences of disregarding the subpoena (a turn of events which may well have appeared realistic in view of Apperson's own earlier demonstrated lack of cooperation).

In such circumstances, and having been in trial for 2 months, I concluded that it would be inappropriate to openendedly extend the case on the possibility that the Board might approve seeking, and a Federal district court judge might order, enforcement of a subpoena which could easily result in evidence of no or, at best, marginal value to the Employer. While I pointed out to the Employer's lead counsel that he might wish to take an interlocutory appeal to the Board from my ruling (the last scheduled date for the hearing as of July 7, when I made the ruling, was July 15), it has not come to my attention that any appeal has been taken.

Gadikian testified that she was in attendance at a union meeting at which Apperson indicated that she was ''not real happy about the Union.'' As the meeting broke up, Gadikian realized that she had met Apperson previously and that she was the niece of Lowery, who was a fellow shop steward of Gadikian's. Later, Gadikian testified, about a month prior to the election, she asked Lowery, ''Pauline, could you possibly, you know, sing the praises of the Union a little bit to Donna, and, you know, help her win us over [sic]?'' Gadikian reported that Lowery had replied that she ''did not

[59] Lecher was at Johnson's house to pick up her children, who were cared for during the day by Johnson's sister.

[60] Lecher did not testify that Gadikian said that the Union *would* negotiate her job out of existence; she used the word ''could.'' Since Gadikian was known to Lecher only as an employee from a unionized store who was helping to organize BJ's, it seems doubtful that the statement, if made, carried the weight that it might have had coming from a known professional union representative.

care to make this a family affair thing.'' Gadikian denied making any threats to Lowery if she did not succeed in turning Apperson around.

Obviously, even considering Apperson's hearsay testimony alone, there was not a showing, in the words of the objection, that the Union had ''threatened'' Apperson's aunt with ''loss of employment'' or other losses unless the aunt was successful in restraining Apperson from actively campaigning against the Union, or threatened Apperson that such action would be taken against the aunt if Apperson continued to refrain from supporting the Union. Even though, as previously stated, I did not find Gadikian to be a particularly trustworthy witness, the record offers no evidence in support of the claimed objectionable conduct, which is Respondent's burden to adduce.

Accordingly, I recommend dismissal of Objection 5.

Having reviewed the evidence pertinent to the three election objections referred to me, I conclude that the conduct found, even assuming arguendo that Riley was an agent of the Union within the meaning of the Act, does not ''warrant finding that it would have a reasonable tendency to interfere with the employees' free choice in the election,'' *Nestle Dairy Systems*, 311 NLRB 987 (1993). I have taken into account a factor sometimes adverted to by the Board—the closeness of the election count,[61] but I am unable to conclude that in any rational universe, the remark by Riley relied on by Respondent, in the circumstances found, would possibly have changed or influenced a single vote. *NLRB v. Superior Coatings*, 839 F.2d 1178, 1180 (6th Cir. 1988) (the objecting party must show ''not only that the unlawful acts occurred, but also that they interfered with the employees' exercise of free choice to such an extent that they employees' materially affected the results of the election'').

Finally, I daresay that any conceivable effect caused by the alleged objectionable conduct was more than offset by votes lost to the Union as a result of the very visible discharges of union activists Riley and Kelley in April and May.

CONCLUSIONS OF LAW

1. Respondent BJ's Wholesale Club, a subsidiary of Waban, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Food and Commerical Workers Union, Local 400, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. At some time between January and May and in April 1992, Respondent's agents communicated to employees that they could not engage in solicitation and/or distribution of literature at such times and in such places as, with respect to union solicitation and distribution, they are legally entitled to do.

4. On April 10 and on May 1, 1992, Respondent violated Section 8(a)(3) of the Act by discharging, respectively, Michael Riley and Anthony Kelley.

5. The aforesaid violations affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. Other than in the foregoing respects, Respondent has not violated the Act as alleged in the complaint.

7. The challenges to the ballots of Michael Riley and Anthony Kelley in Case 5–RC–13708 are overruled and, together with the challenged ballot of Aaron Fletcher, the three challenged ballots should be opened and counted.

8. The matters raised in the Employer's Objections 1, 4, and 5 to the election of May 22, 1992, in Case 5–RC–13708 do not warrant setting aside the election as conduct which reasonably tended to affect the results of the election.

THE REMEDY

The traditional remedies of a cease-and-desist order and posting of notices are appropriate here. In addition, having found that Respondent unlawfully discharged Michael Riley on April 10, 1992, and Anthony Kelley on May 1, 1992, I shall recommend that it be ordered to offer them immediate and full reinstatement, without prejudice to their seniority and other rights and privileges, and make them whole for any net loss of earnings they may have suffered from the dates of their discharge to the dates of Respondent's offers of reinstatement, with interest, in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[62]

I shall also recommend removal and rescission from Respondent's files of all documentation relating to the discharges.

[Recommended Order omitted from publication.]

[61] *Smithers Tire*, supra, 308 NLRB at 73; *RJR Archer, Inc.*, 274 NLRB 335, 336 (1985).

[62] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).